TENNESSEE

CONSTITUTIONAL LAW

COMPILED FROM THE OPINIONS

OF THE

SUPREME COURT OF TENNESSEE

PUBLISHED IN

THE FIRST NINETY-FIVE VOLUMES OF TENNESSEE REPORTS, THOMPSON'S TENNESSEE CASES, TENNESSEE LEGAL REPORTER AND THE OPINIONS OF CHANCELLOR COOPER IN TENNESSEE CHANCERY REPORTS, COVERING A PERIOD OF ONE HUNDRED YEARS FROM

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BY

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PREFACE.

The first Constitution of Tennessee was framed by a convention which assembled at Knoxville January 11, 1796, and which adjourned February 6, 1796. The second Constitution was framed by a convention which assembled at Nashville May 19, 1834, and which remained in session until August 30, 1834. This instrument was amended in 1853, and again by a mass meeting of "Union men" which assembled January 9, 1865, and adjourned January 26, 1865. The present Constitution was framed by a convention which assembled at Nashville January 10, 1870, and which adjourned February 23, 1870. This Constitution went into effect May 5, 1870.

This volume contains a comparison of each section of the Constitution of 1870 with the corresponding sections of the Constitutions of 1834 and 1796. Where there has been no change in a section, this fact appears. Where there has been an alteration, this is shown. All obsolete sections and clauses are also shown. By this plan all three of the Constitutions are given in a little more than the space of one, and the corresponding sections in each may be easily compared by the reader.

The first judicial system for the final decision of causes went into effect April 1, 1796. The reported opinions of this court are contained in one hundred and two volumes, as stated on the title page. I have examined each of these volumes page by page, and present in this book all that I think a lawyer will need to know about the facts of each case relating to constitutional questions, the conclusions of the court and the reasoning and authority upon which each opinion is based. This is done in the language of the judge delivering the opinion, except that in many instances where opinions merely reaffirm settled doctrines, or are of little importance, or are incompactly worded, the syllabi only are given; but in all cases where I think the syllabi omit any fact or reasoning important or useful to the lawyer, I quote from the opinion of the court. The two classes of cases are distinguished by using the word "held" before each of the syllabi.

After each section of the Constitution I have arranged, according to classes, subjects, etc., every opinion relating to that section. Where two or more sections are considered jointly, so that the opinion can not be divided, their treatment is placed under one section, and reference made to it in the index to each of the other sections considered.

Every statute considered from a constitutional standpoint is cited, and, if sustained, is traced down through the several Codes to the M. & V. compilation. For instance, if a statute was declared constitutional before 1330 and has not been repealed, I show where its provisions appear in Haywood & Cobb's Digest (1831); the Code of 1858; T. & S. (1871), and M. & V. (1884). Statutes passed and considered since 1884 are properly cited.

The holding of the court on every question relating to any rejected provision of the first or second Constitutions is given briefly in the footnotes, except the opinions relating to the Schedule to the Amendments of 1865, in which instances citations only are given. Opinions that have been overruled are not quoted from, but are cited in opinions overruling them. Where a section of the Constitution

is referred to in an indirect or unimportant way, reports and pages are given in the footnotes. In the last part of the book is given the holding of the court on every question relating solely to the Constitution of the United States.

Cooper's edition of Tennessee Reports has been used in preparing this work, but the paging in the original edition of Reports has been retained. Numbers of Reports have been substituted for names of the Reporters; but for the convenience of the profession, I have inserted a page preceding the table of cases, which contains the numbers of Reports and the names of the Reporters which correspond with them. With each opinion is given the name of the judge delivering the opinion, the names of dissenting judges, if any, and the year in which the case was decided.

The several indexes to the Constitution and the body of the book and the double-indexed table of cases, each citing the article and section of the Constitution to which it relates, and the page in this volume where found, will make reference to any section, subject or case as convenient as possible.

I have prepared this book, believing that such a work is needed by the legal profession in Tennessee; and during the course of its preparation I did not forget that its usefulness would depend upon the exercise of care and judgment in making extracts from opinions and in the general arrangement and classification of subjects. As this is the first book of the kind published, I have not had the benefit of another's work, and, therefore, ask that the general plan of this volume be not too harshly criticised. At the same time, I beg permission to say that I do not believe an investigation of the subject-matter of the book will reveal any material error or omission, because the work, to quote from prefaces to many other law books, has been "a labor of love." I have endeavored to make the book meet the requirements of the profession, and trust that it will be found to do so.

Very truly,

DOUGLAS ANDERSON.

NASHVILLE, September 19, 1896.

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Constitution of Tennessee,

1870.

PREAMBLE AND DECLARATION.

WHEREAS, The people of the territory of the United States south of the River Ohio, having the right of admission into the General Government as a member State thereof, consistent with the Constitution of the United States, and the act of cession[1] of the State of North Carolina, recognizing the ordinance for the government of the territory of the United States northwest of the Ohio River, by their delegates and representatives in convention assembled, did, on the sixth day of February, in the year of our Lord, one thousand seven hundred and ninety-six, ordain and establish a Constitution, or form of government, and mutually agreed with each other to form themselves into a free and independent State by the name of the State of Tennessee; and, [Above substantially same as in Const. 1796.]

WHEREAS, The General Assembly of said State of Tennessee (pursuant to the third section of the tenth article of the Constitution), by an act passed on the twenty-seventh day of November, in the year of our Lord, one thousand eight hundred and thirty-three, entitled "An act to provide for the calling of a convention," passed in obedience to the declared will of the voters of the State, as expressed at the general election of August, in the year of our Lord, one thousand eight hundred and thirty-three, did authorize and provide for the election, by the people, of delegates and representatives, to meet at Nashville, in Davidson County, on the third Monday in May, in the year of our Lord, one thousand eight hundred and thirty-four, for the purpose of revising and amending, or changing the Constitution; and said convention did, accordingly, meet and form a Constitution, which was submitted to the people, and was ratified by them on the first Friday in March, in the year of our Lord, one thousand eight hundred and thirty-five; and,

WHEREAS, The General Assembly of said State of Tennessee, under and in virtue of the first section of the first article of the Declaration of Rights, contained in and forming a part of the existing Constitution of the State by an act passed on the fifteenth day of November, in the year of our Lord, one thousand eight hundred and sixty-nine, did provide for the calling of a convention by the people of the State, to meet at Nashville, on the second Monday in January, in the year of our Lord, one thousand eight hundred and seventy, and for the election of delegates for the purpose of amending or revising the present Constitution, or of forming and making a new Constitution; and,

WHEREAS, The people of the State, in the mode provided by said act, have called said convention and elected delegates to represent them therein; now, therefore,

We, the delegates and representatives of the people of the State of Tennessee, duly elected, and in convention assembled, in pursuance of said act of assembly, have ordained and established the following Constitution and form of government for this State, which we recommend to the people of Tennessee for their ratification; that is, to say: [Entire preamble and declaration substantially same as in Const. 1834.]

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[1] 8, 251: 9, 3.

ARTICLE I.

DECLARATION OF RIGHTS.

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Article 1, Section 1. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper. [Same as Const. 1834, art. 1, sec. 1; Const. 1796, art. 11, sec. 1.]

Art. 1, Sec. 2. That government, being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind. [Same as Const. 1834, art. 1, sec. 2; Const. 1796, art. 11, sec. 2.]

Right of Independent Government to Regulate Its Own Concerns.—Whyte, J.: "It is certainly a correct proposition, not only in theory, but proved by constant practice, that every independent community or government has the right to regulate its own concerns; to make what laws it pleases; to abrogate and repeal existing laws heretofore made, and enact new ones respecting the same matters. The Constitution of North Carolina, in the preamble and first section, and her Declaration of Rights, sections 1 and 2, adopted December 17 and 18, 1776, declared this; and the Constitution of Tennessee, in its preamble and article 1, sections 1 and 2, adopted February 6, 1796, did the same. Hence, it is the power of these sovereign States, declared in and pursuant to their Constitutions and Declarations of Rights acted upon in practice from the time of making them in their respective legislatures, and the laws so made, that is to give the rule or rules governing the present case, and not the power of the canon law, the common law of England, or the law of any other community or country whatever." 9, 179. *Bashaw v. The State.* 1829.

The Voice of the People Must be Consistent with the Constitution.—Peck, J.: "When one of the kings of England wished to confer with the judges touching a case to come before them, he was refused admittance. If, in this country, it be conceded that all power is inherent in the people, and their voice is heard through the legislature, their voice must be consistent with the Constitution and that general law of the land which is made to reach all alike; and whenever judges

in this country can not stand up as firmly and independently before the people as the judges of England did before their sovereign, then there is an end of the administration of law, and a reign of terror at hand." 14, 120. [1]*Fisher's Negroes v. Dabbs et al.* 1834.

Observance of Statutory Precautions by Railroad Employees — Police Power.—With reference to sections 1167 and 1168 of the [2]Code of 1858, SMITH, J., said: "These sections are not invalid for want of constitutional or sovereign power in the legislature to enact the law expressed by them. The statute is founded on a policy of double aspect — one to guard and protect the safety of the general public, and the other, to compensate the injured person, which has sanction in what is called the police power of the government." 46, 50. *L. & N. R. R. Co. v. Burke.* 1868.

Sovereignty of the State — Power of Congress — Internal Regulations.—TURNEY, J.: "Upon the question of the sufficiency in amount of the stamps affixed to the deed, if the Acts of Congress declaring 'that it shall not be lawful to receive any instrument, document or paper required by law to be stamped, unless stamps of the proper amount shall have been affixed and cancelled, and declaring such instruments void, and that they shall not be used in evidence, is the law,' then this deed in trust is void. The several States of the Union became entitled on the 4th of July, 1776, to all the rights and powers of sovereign States, as respects their internal regulations. McIlvaine *v.* Cox, 4 Cr., 209. The States are sovereign within their own limits, and foreign to each other, regarding them as local governments. Bank U. S. *v.* Daniel, 12 Pet., 33. The rights of the crown devolved on the States by the Revolution, and were confirmed to them by their treaty of peace in their sovereign capacity. Bald., 60. The provision of U. S. Stat. of 1866, that no document not duly stamped, shall be used as evidence in any court, until the requisite stamps shall have been affixed thereto, applies only to the courts of the United States. Carpenter *v.* Snelling, 97 Mass., 452; Lynch *v.* Morse, Id., 458. The courts of the States do not exist by the authority of the United States, or by its permission, and are not objects over which its sovereign power extends, except, perhaps, for the purpose of protection. It does not possess over them even the incidental power of taxation. The people of the State possess all the powers of their original unlimited sovereignty, except such as have been delegated by them to the Government of the United States, or are prohibited to the States by the Constitution. Union Bank *v.* Hill et al.

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[1]See same case, art. 1, sec. 17.

[2]T. & S., 1167, 1168; M. & V., 1299, 1300.

"There has been no delegation by the States to Congress, of power or authority to legislate for the internal regulation of the States, nor are the people of the States prohibited by the Constitution from creating and regulating the courts of the States and declaring the rules for their government. The legislature of the State is the only power which can enlarge or contract the rules of evidence or create and enforce new rules in the courts of the State. If Congress may, by its enactments, make or change the rules of evidence as applicable to the courts of the States in any one particular, it may in all things. It may totally abolish existing rules of evidence and practice and substitute others new and wholly different. If it may say what shall and shall not be a muniment of title, as it has proposed to do in the acts in review, it may as well prescribe the qualification for officers of the State, created by the legislature of the State. In short, there is no limitation to its powers of legislation for the States, for each, according to its political complexion, and the favor or disfavor of Congress. From such congressional interference, consolidation and centralization must ensue, the rights of the States be destroyed and their sovereignty exist only in history."[1] 48, 637. *Sporrer v. Eifler et al.* 1870.

ART. 1, SEC. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishment or mode of worship.—[Same as Const. 1834, art. 1, sec. 3; Const. 1796, art. 11, sec. 3.]

ART. 1, SEC. 4. That no political or religious test, (other than an oath to support the Constitution of the United States and of this State,) shall ever be required as a qualification to any office or public trust under this State.—[Except line in parenthesis this section same as Const. 1834, art. 1, sec. 4, and Const. 1796, art. 11, sec. 4.

ART. 1, SEC. 5. That elections shall be free and equal; and the right of suffrage, as hereinafter declared shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction.—[Const. 1834, art. 1. sec. 5, and Const. 1796, art. 11, sec. 5 provided only, "That elections shall be free and equal."

[1] See 52, 688.

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ART. 1, SEC. 6. That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.[1]—[Const. 1834, art. 1, sec. 6, and Const. 1796, art. 11, sec. 6 provided only, "That the right of trial by jury shall remain inviolate."

How Far this Right Extends.—In this case SMITH, J., held: "The proper and settled construction of" this provision "is, that the right shall remain inviolate as it existed at the formation of the Constitution. Cases, which, before the Constitution, were not triable by a jury, need not be made so now. Parties cannot now be deprived of a trial by jury, who could demand it at and before the formation of the Constitution; cases not having the right, at that time, to demand a jury, cannot now, as of right, because of this constitutional provision." **46**, 382. [2] *Trigally v. Mayor etc. of Memphis.* 1869.

In Criminal Cases.

This Clause a Limitation Upon Legislatures and Judges—Calling of Jurors—Locality Important—Strictness in Criminal Proceedings—Murder—Verdict Must Find the Degree.—PECK, J.: "As the offense of murder in the first degree must be brought within the statute, to justify

[1] **33**, 441; **91**, 625.

[2] See same case, art. 1, sec. 8.

the judgment of death, and as all other kinds of murder shall be deemed murder in the second degree, we have not in this record the means of distinguishing which of the two offenses has been committed, and this, by the [1]act, it is made the duty of the jury to find 'in their verdict,' specifying the degree of guilt. The finding is no more certain than if the defendant had confessed his guilt, in which case it is made indispensable to empanel a jury to find the degree of the crime. It is not shown in the record that the traverse jury were good and lawful men; they are called and sworn, but it is not shown that they were persons qualified to serve. In latter times, in this court, I have stood alone in requiring strictness in the proceedings on the criminal side of our courts. I will not say that I regret having been so often overruled. The country will regret it, and they have power to set the matter right. When the question on captions to indictment was raised, and it became convenient to overrule what Judge Haywood and myself had decided, the grounds on which it was done, and the authority to authorize the doing of it, has barely been glanced at in some of the opinions. Records in cases long since determined were produced and compared with those before us, and the judges doing it measured his science in criminal law by that standard, and held, no doubt upon a principle purely republican, that all persons should stand upon the foot of equality; that, others having been condemned under rules so relaxed, these should also share the same fate. For my part, I thought love of, and respect for, the Constitution of my country was a better test to prove the integrity of the judge, and I based myself upon it. The clause in the Bill of Rights, 'that the right of trial by jury shall remain inviolate,' was omnipotent with me. This clause was put in the Constitution as a limitation upon legislatures and judges—a landmark by which men should be safe, in the journey of life, from the besetments that might have been intruded upon them without the clause. With this clause, and it adhered to by the courts, where was the room to relax? The legislature could not fritter away this right of freedom, by giving us new rules not in accordance with the Constitution. No sheriff who summoned the jury had it in his power to save the life of one man, and destroy that of another, by his selection of a jury. No! The clause was made for the time being, and was unalterable by legislative enactment, or by any rule of decision of this court. The provision points us to the law as it then stood, touching the trial by jury, and said that right shall remain inviolate. Strange that we should stand up so close to the provisions which declare that no *ex post facto* law shall be made, or the writ of *habeas corpus* suspended, and so entirely lose sight of the other provision. Who is so dull as not to know that the persons to be called as jurors, the calling of them, the place they were to come from, their selection

[1] T. & S., 4600; M. & V., 5351.

and oath, make parts in the trial by jury. Dispense with any one requisite, and where will we stop? In England, in the time when Sydney and Russell were tried, the rules were all well enough; but the heat and ferment of the times relaxed the rules, the judge became untrue to his trust, and men were destroyed. Our forefathers saw that, and wisely provided against it in our Constitution. I should think I gave but a poor evidence of my integrity, to fume and rant about a violation of the Constitution in a matter merely affecting a few dollars, and then be silent where a similar violation affected liberty or life. I can not do it; and, however much I may respect the opinions of others upon rules of property depending upon opinions of judges upon statutes or common law, I have no compromise to make where my mind is fully satisfied upon the plain letter of the Constitution. The point is expressly made, and I feel myself bound to repeat my opinion[1] upon it." 15, 266. *Kirby v. The State.* 1834.

This Section Considered in Connection with Art. 1, Sec. 14—Design of Both to Secure Common Law Mode of Prosecutions—Magna Charta—Rules of Construction—Due Process of Law—U. S. Constitution, Art. 5—Once in Jeopardy—Small Offense Law Constitutional.—The plaintiff in error was indicted, tried and convicted at April term, 1848, of the Circuit court of Grainger county, of an assault and battery upon one John Dalton. Upon being arraigned the defendant, in the court below, pleaded in bar to the indictment a former trial and conviction for the same offense before a justice of the peace, pursuant to the act entitled "[2]An Act for the punishment of small offenses," passed January 10, 1848. To this plea of the defendant the attorney general demurred, and, on argument, the demurrer was sustained upon the ground that the act was unconstitutional and void, and that, therefore, the former trial and conviction, under its provisions, formed no bar to this prosecution; and the court proceeded to render judgment upon the demurrer, that the defendant for the offense charged in said indictment be fined the sum of two dollars and fifty cents (the magistrate had fined him two dollars) and costs. From this judgment the defendant appealed in error.

McKinney, J.: "It is argued by the attorney general that the first section of the act in question violates alike the sixth and fourteenth sections of the Declaration of Rights. . . . It will be observed, in the first place, that the fourteenth section . . . relates only to the mode of prosecution or formal accusation of offenders. And we are not prepared to hold that its prohibition includes, or at all applies

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[1] All the judges concurred in a reversal of the judgment; but Green, with whom Catron concurred, did not discuss the above features of the case, and it does not appear what views they entertained in this respect.

[2] Code 1858, 4994; T. & S., 4994; M. & V., 5819.

to, prosecutions for mere misdemeanors. With a view to this question, let us inquire how the law of England stood upon this subject, at the time of the American Revolution, in order to ascertain what law, in relation to the prosecution of offenses, our ancestors brought with them to this country as a part of their 'birthright and inheritance.' For we apprehend the rule that statutes are to be construed in reference to the principles of the common law is alike applicable to a provision of the Constitution, or fundamental law, and for the same reason that the framers of the law in either case are not to be presumed to have intended to make any change or innovation upon the common law further than is expressly declared.

"The provision of the fourteenth section is, in substance, borrowed from Magna Charta, as are also the provisions of several other sections of the Declaration of Rights. The great charter, ch. 29 (9 Henry III) declares that 'no freeman shall be taken or imprisoned, or be deprived of his freehold, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.' 2 Inst., 45. And in his exposition of the meaning of the words, 'but by the law of the land,' in the foregoing chapter, Sir Edward Coke says: 'For the true sense and exposition of these words, see the statute of 37 Edward III, ch. 8, where the words "by the law of the land" are rendered without due process of law, for there it is said, though it be contained in the great charter that no man be taken, imprisoned, or put out of his freehold without process of the law — that is, by indictment, or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law, without being brought in to answer but by due process of the common law.' 2 Inst., 50. And, according to the same author, 'this chapter is but declaratory of the old law of England.'

"What, then, was the common-law mode of prosecution? Blackstone, in his Commentaries (4th vol., 301), informs us that 'this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way is either by presentment or indictment.' The mode of prosecution, without a previous indictment or presentment by a grand jury 'to fix the authoritative stamp of verisimilitude upon the accusation,' is that of information. Id., 307, 308. Informations, exhibited in the name of the king, are of two kinds: first, those properly his own suits, and filed *ex officio* by the attorney general; and, second, those in which, though the king is nominal prosecutor, are yet at the relation of some private person. The objects of the latter are 'and gross and notorious misdemeanors, riots, batteries, libels, any other immoralities of an atrocious kind.' And when an information of either kind was filed, it was tried by a petit

jury of the county where the offense arose. And this mode of prosecution, according to the learned commentator, is as ancient as the common law itself. Id., 309. 'But these informations are confined, by the constitutional law of England, to mere misdemeanors only; for, whenever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it.' Id., 310. From this brief view of the usual manner of prosecuting offenders at common law, it appears that, for mere misdemeanors, persons might be put to answer without presentment or indictment previously found by a grand jury; and that it was only for 'crimes in the proper sense of that term, or felonious offenses, that it was indispensable that the accusation should be warranted by the finding of a grand jury, before the offender could be put to answer. When our ancestors removed to America they brought with them this privilege, as part of the common law, and it has been incorporated, in substance, into the Constitution of the United States, and perhaps all our State Constitutions. The fifth article of the Amendments to the Federal Constitution declares that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger.'

"In commenting upon this article, Mr. Justice Story says: 'The first clause requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer any capital and infamous crime charged against him. And this is regularly true, at the common law, of all offenses above the grade of common misdemeanors.' Commentaries on Const., vol. 3, sec. 1778. The phrase 'criminal charge,' in the fourteenth section of our Declaration of Rights, must be taken to have been used in its proper and technical sense. Such is the rule of construction in reference to statutes, unless it clearly appears that the words were intended to be applied differently from their ordinary legal acceptation. The terms 'crime and misdemeanors,' in their legal signification, are descriptive of offenses of different and distinctive grades. 'In the English law misdemeanor is generally used in contradistinction to felony, and misdemeanors comprehend all indictable offenses which do not amount to felony.' 4 Bla. Com., note 3, by Christian. It can not, for a moment, be supposed that the term 'criminal charge' was intended to comprehend or apply to misdemeanors, because, by the common law, as well as by statutory enactments in North Carolina, in force in this territory at the adoption of our Constitution, and still in force, numerous offenses of the grade of misdemeanors were summarily tried and punished, without presentment or indictment, by a

single magistrate, as in cases of drunkenness, profane swearing, Sabbath-breaking, vagrancy, and others that might be enumerated.

"We incline to the opinion that the sixth and fourteenth sections of the Declaration of Rights were merely designed to secure the mode of prosecution in cases of felony, and of the trial by jury, as they respectively existed at the common law. The fact that the practice had been, in North Carolina, and has continued to be in this State, to prosecute misdemeanors, not upon information, but by presentment or indictment, weighs nothing in settling the true meaning of the constitutional provision in question; because the object of this provision was not to forbid the prosecution of misdemeanors by the finding of an indictment or presentment by a grand jury, nor does it forbid this, but to guarantee to every freeman the great privilege and security of not being put to answer any criminal charge affecting the right to life or liberty without a written accusation, previously verified by the oath of a grand jury, in the form of a presentment or indictment. . . .

"Conceding, for the sake of the argument, that the fourteenth section of the Declaration of Rights applies to misdemeanors, is either the provision of this, or of the sixth section, violated by the act in question? The first section provides 'that any person brought before a justice of the peace for any misdemeanor may plead guilty. Whereupon the justice shall hear evidence, and fine the offender, according to the aggravation of his offense, not less than two dollars, and not exceeding fifty dollars, together with the costs.' The fifth section directs 'that if the offense merit a fine exceeding fifty dollars, or imprisonment and fine of any amount, or imprisonment alone, or if the offense is punishable expressly by both fine and imprisonment, the justice shall not render judgment against the offender, but shall proceed as usual.' And by the twenty-second section is provided that 'if any person proceeding under this act abuse or exceed his power, or exercise power not granted, the injured party by written petition, alleging the grievance, and verified by his, or his agent's affidavit, and addressed to the circuit judge of the county in which the proceeding is had, shall have a writ of supersedeas and certiorari granted by any circuit judge, by which the proceeding shall be transferred to the Circuit court of the county, and be there determined as though nothing had been done under this act.' We confess ourselves utterly unable to perceive how either of the sections of the Declaration of Rights referred to is, in the slightest degree, infringed by any one of the provisions of the foregoing act, or that they are, in any respect, incompatible with each other. How does this act 'put the defendant to answer' without his consent; or, how, without his consent, deprive him of a trial by jury, as is the true import of the prohibitions contained in the two sections of the Bill of Rights in question? When brought before the justice upon warrant, if of sufficient legal discretion

to be amenable to the law for his offense, and left to the exercise of his own volition, why may he not be permitted, in order to escape the delay and expense of a formal prosecution in the Circuit court, to submit to a mere fine, and thereupon be discharged? There is nothing compulsory in the act. The privilege is for the ease and benefit of the defendant. It is at his election whether to avail himself of it or not. The justice can not move a step under the act unless the defendant prays the benefit thereof. The proposition that the privilege secured to defendants by this act is a violation of any constitutional right is scarcely worthy of serious discussion. It involves the palpable absurdity that a party is deprived of a right which he voluntarily waives or surrenders. Has it not been the every-day practice in the Circuit courts for defendants, bound over to answer for misdemeanors, to plead guilty and waive a trial by jury, and this not unfrequently, even before the finding of an indictment? And who ever supposed that the judge, in yielding to the prayer of the defendant in such case, was violating the Constitution, and depriving the defendant of a right secured to him? In the case under consideration, we take it, his honor, the circuit judge, who rendered judgment against the defendant upon the demurrer, never suspected that he was violating the constitutional rights of the defendant, although he was deprived of a trial by jury, and that, too, upon a mere fiction of law, not by his own consent. The numerous cases of summary trial and conviction, before alluded to, have never been regarded as in violation of the Constitution. . . . The power of the justice is so guarded and circumscribed as to secure the defendant from any serious injury. And he has it in his power, in case of the least excess or abuse of the discretion conferred upon the justice, to avoid the proceeding altogether, by having the case transferred to the Circuit court. With the wisdom or policy of the act, we have nothing to do; our duty is confined to the determination of the question, whether it be or be not constitutional; and this question, we think, admits of no doubt. . . .

"But there is another ground upon which this proceeding was wholly unwarranted—all other questions aside. Supposing the act to be utterly unconstitutional and void, to every intent and purpose, still, if the State, by whose sanction it was enacted, has treated it, in this instance at least, as a valid and constitutional law, and has, under its forms and by its authority, caused the plaintiff in error to be tried, convicted and punished, and the conviction has been acquiesced in and remains in force, upon what principle or authority is it that the State shall be permitted to treat such trial and conviction as a nullity, and demand a second trial, conviction, and punishment of the individual in another tribunal for the same identical offense? The defendant, whose rights were invaded, according to the argument of the attorney general, might have refused to submit and have demanded a legal trial, but he did not

do so; and surely a second prosecution, at the instance of the State, would be as much putting the offender twice in jeopardy, and twice inflicting punishment for the same offense, as if the first conviction and punishment had been under a constitutional and valid law. The State is estopped to demand such second prosecution." 28, 47. *McGinnis v. The State.* 1848.

Jury Composed of Less than Twelve.—McKINNEY, J., held that "A trial by a jury composed of less than twelve in number, in a criminal case, is a nullity." 37, 361. *Bowles v. The State.* 1858.

Misdemeanors—Recorders of Towns—Criminal Jurisdiction—Penalties—Warrant.—McFARLAND, J., held that "Misdemeanors are not within the meaning of the fourteenth clause of the Bill of Rights, ordaining that no person shall be put to answer any criminal charge, but by presentment or indictment, nor within" this clause. "Recorders of towns are not vested with criminal jurisdiction to try offenses against the State, except concurrently with magistrates in cases of submission, or to require the defendant to enter into bond for his appearance in court.[1] If a penalty is prescribed by ordinance of the city for the offense, it may be recovered by suit in the nature of an action of debt which should be commenced by a warrant. Tenn. Leg. Rep., vol. 2, p. 12. *Hogan v. Mayor etc. of Chattanooga.* 1877.

Proof of Certain Facts—Prima Facie Evidence—Act 1895, Ch. 67, Valid.—CALDWELL, J., held that "The right of trial by jury is not abridged by a provision in a statute that proof of certain enumerated facts shall constitute *prima facie* evidence of fraudulent intent in the prosecution of an offense created by the statute." 95, 563. [2] *State v. Yardley.* 1895.

In Civil Cases.

Circuit Court—Jurisdiction Over Causes Against Putative Fathers of Bastard Children—Under the Old Law No Trial by Jury—But Now Allowed.—REESE, J.: "These are causes arising under the Act of 1741, ch. 14, against the putative fathers of bastard children. And the question presented by the records for our determination is, to which court—the County or the Circuit court—does the jurisdiction over such causes appertain? To determine this question we must refer to the Acts of 1835, ch. 6 and ch. 5. The seventh section of the act of that year, ch. 5, confers upon the Circuit courts general jurisdiction in all suits of law, and to administer right and justice, according to law, in all cases where the jurisdiction is not conferred upon another tribunal. They also have exclusive jurisdiction in all causes triable by jury,

[1] T. & S., 4966; M. & V., 5794.

[2] See same case, art. 1, sec. 18, art. 2, sec. 17.

both criminal and civil, of which the County courts had jurisdiction. Upon the County courts, by the third section of the Act of 1835, ch. 6, conferred jurisdiction by the laws then in force, except that they shall not have jurisdiction of any pleas, real, personal, or mixed, nor of any cause, civil or criminal, wherein, by the Constitution and existing laws of this State the parties are now entitled to a trial by jury, nor shall said court have power to empanel a jury in any cause whatever.

"Before the passage of these acts the jurisdiction of the County court was exclusive in questions of filiation arising under the Act of 1741, ch. 14. The bond which that act requires to be given for the indemnification of the county, is to be made payable to the justices of the County court. One condition of the bond is, that the party shall perform such order, touching the maintenance of the bastard child as that court may, from time to time, make. The Act of 1822, ch. 29, sec. 2, provides that, at the end of three years, allowances shall cease, and that the County court shall dispose of the bastard child as shall most conduce to its interest, either by giving it to the reputed father, or binding it out to some suitable person, in their discretion.

"This whole proceeding of filiation partakes in its character of a county, rather than any more general interest, and the chief object is to indemnify the county against liability to maintain a pauper. It is a matter of county business. What, then, has taken from the County court a jurisdiction so natural and so proper to it, and which it has so long possessed? It is said to be the Act of 1835, above quoted, in connection with the provision of the first section of the Act of 1822, ch. 29, which permits the putative father to file on oath a negation of the charge, upon which being done, 'the court may hear proof and determine the matter as to right, and justice may appertain.' This, it is said, entitles the party to a jury, and, of course, the Acts of 1835 transfer the jurisdiction to the Circuit court. Within a short time after the passage of the Act of 1822, the Supreme court in the case of [1]Goddard *v.* The State, determined that the court could, in the language of the act, hear the proof and determine the matter, and that the parties had no right to a jury. This contemporaneous decision has not since been overruled. In the case of The State *v.* Coatney, 8 Yer., 210, there seems, indeed, to have been a jury in the County court. But that circumstance constituted no part of the discussion before the court, and

[1]While the County court had jurisdiction to try causes, it was held that the defendant in a bastardy proceeding was not entitled to a jury trial. See Goddard *v.* The State, art. 1, sec. 8; Thompson's Tennessee Cases, p. 57. But when the County court allowed a jury trial, it was held that this action was not erroneous. **16**, 212. But now the County court has no power to try causes by jury, and, on any appeal in a bastardy cause, the trial in the Circuit court is by jury. T. & S., 5372; M. & Y., 6217. Speaking of this provision taken from the Act of 1851, ch. 187, Caruthers, J., in O'Neal *v.* The State, **34**, 218 (1854), said: "This was certainly a wise provision, as great injustice might be done to either party in a tribunal where there is no jury, and but indifferent qualifications to conduct an exciting and difficult investigation, according to the rules of law. Even the wicked and debased should have even-handed justice, so far as they have rights which are founded in the law. The law is made for the protection of all, of every grade and condition, and should be administered in its purity to every one who is permitted to enter into its temples, and the way made open to the highest tribunals provided for the correction of errors."

forms no ground of the decision. And, indeed, it would follow that, if the court might hear and determine the matter, they might, if they saw fit, perhaps, have the aid of a jury, without such proceeding constituting an error for which the Supreme court would reverse. These questions of filiation, therefore, are not jury causes, and by the very terms of the third section of the Act of 1835, ch. 6, are left with the County court, while there is nothing in the seventh section of the Act of 1835, ch. 5, to transfer the jurisdiction to the Circuit court."[1] **19**, 125. *Kirkpatrick v. The State.* 1838.

Motion Against Surety — Proof That the Applicant Was Surety.— In this case Judges POWELL and HUMPHREYS agreed that under the [2]Act of 1801, ch. 15, on motion to recover money paid by a surety, the court could not receive proof that the applicant was surety. In consequence of this opinion the [3]legislature in November, 1809, ch. 69, authorized the court to empanel a jury. **1**, 335. *Love v. McCool.* 1808.

Garnishment — Summary Remedies Against Public Officers — Jurisdiction of Justices — Acts Increasing.[4]—PECK, J.: "The legislature passed an act on the 15th of November, 1821, entitled, 'An Act prescribing the mode by which the holders of the notes of the Farmers and Mechanics' Bank, at Nashville, and the Fayetteville, Tennessee, Bank, may, on their refusal to pay the same, recover judgment.' This act, it is said, has given rise to the proceedings in this case against Vanzant. And it is insisted, that by its provisions the charter of the bank has been violated; that said act is in violation of the Constitution of the State, is partial, unequal and oppressive in its operation. . . . The act provides, in substance, that when payment of the notes of said bank has been refused, if under one hundred dollars, warrants may issue from under the hand of some justice of the peace, against such bank, and after the demand and refusal to pay at said bank, judgment may be entered up, and execution may be issued, as in other cases. That if the execution can not be satisfied out of funds of the institution, then the officers having such execution, may summon persons supposed to be indebted to said bank, who shall, on oath declare what they owe said bank, etc. The act further provides that when a writ issues and is served upon the officers of such bank, the party may have his election, either on original or mesne process, to summon persons as garnishees to answer on oath what they are indebted to said bank, etc.; and on the return of such summons with the writ, and after examination of such garnishee, 'if he shall declare that he is indebted to such bank in notes of said bank or banks, then the court may empanel a jury to ascertain the value of such

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[1] H. & C., vol. 1, p. 22; Code 1858, 5354, et seq.; T. & S., 5354, et seq.; M. & V., 6199, et seq.

[2] M. & V., 4364.

[3] M. & V., 4367.

[4] See Morford v. Barnes, p. 16.

notes, and to inquire if the note so taken and made payable in the notes of such bank was done with a view to defraud the note-holders of such bank. If done with such view, the court to give judgment for the amount specified in such note; if otherwise, for such value of the notes of said bank as may be found by the jury.

"No new process is given by this act, unless it be that of a summons for a garnishee at the time of serving the original writ, or *capias ad respondendum*. Was it competent for the legislature, consistent with the Constitution of the State of Tennessee, to give this summons as a cumulative remedy to those other remedies which existed at the time the law passed? To admit the principle that such a law cannot be passed by the legislature, would be at once to strike at the root of all those statutes providing summary remedies against sheriffs, coroners and constables, delinquent at the time of the passage of the law; also against those providing a remedy for securities who have paid the debt of their principal. In short, it would be to admit that an existing contract could not be reached if a change in the remedy were to take place, so as to alter the form of the process after such contract had been made. Whoever pretended that the acts increasing the jurisdiction of justices of the peace from twenty to fifty dollars, and afterwards from fifty to one hundred dollars, were unconstitutional, because the tribunal and process was changed during the existence of the debt? It was indeed urged, and with some plausibility, that they were unconstitutional, because it gave the plaintiff a summary mode of proceeding, and that, too, without an intervening jury trial, and that the election of a plaintiff to sue before a justice placed the party defendant in such a situation that he could not have a trial by jury without giving security for the debt, whereas the law as it stood before gave him a jury trial on appearance bail only. These, though strongly urged to the Supreme court as constitutional objections, were overruled on the ground that the right of trial by jury was not by those acts taken away, even in cases growing out of Acts of Assembly where summary proceedings were given, and where the passing of a jury upon matters of fact seem to have been overlooked, still the courts, in doing a defendant justice under these acts, will empanel a jury and submit issues; this has been done on motion against sheriffs and other officers, under some of those acts authorizing the court to give judgment on motion. So in proceedings in caveat cases, a jury has to pass upon the facts, unless the case be agreed. Cases growing out of these acts go to show that it does not follow that the ancient right of trial by jury is taken away, because the pleadings and issues are not submitted in common law form. This Act of Assembly then, so far as considered, does not violate the Constitution; it does not give to any court an arbitrary power to seize the estate of the bank, or the debtor to the bank, and dispose of it without

giving the parties a day in court, and the means of contesting before a jury all such facts as may be necessary to the attainment of justice." 10, 263. [1]*Vanzant v. Waddel.* 1829.

Acts Extending Jurisdiction of Justice of the Peace — Unreported Cases Cited. — PECK, J.: "The exercise of jurisdiction by justices on sums above twenty dollars has repeatedly been called in question.[2] Under the act of 1794, which was in force when the Constitution of Tennessee was framed, justices of the peace out of court had jurisdiction to the amount of twenty dollars, and no more. The act extending that jurisdiction to fifty dollars (act of 1801) was directly made the determining point. In the case of Stephens *v.* Henderson, Supreme court, Knoxville, Overton and White presiding, shortly after the organization of that court, the question was presented in the record in a way that forbade escape. And the court met it directly. It is to be regretted that the opinion has never been published, but it is recollected that the court assumed the ground in support of the constitutionality of the act on the premises that, inasmuch as the party was in all cases allowed his appeal, when he could have a trial by jury, the right of trial by a jury was not taken away, so that the terms of requiring bail or security for the money belonged to the legislature to provide; and, though the security required in cases of appeal differed from those cases where the party was brought into court by original writ, still, as it did not take away the right of trial by jury, the act was not unconstitutional. This construction of the act has been followed ever since. It is not speaking too largely to say that hundreds of cases have been before the Circuit and Supreme courts where this question of jurisdiction necessarily arose, and when judgments conformably to the opinion in Stephens *v.* Henderson have been rendered. In the case of [3]Thompson *v.* Gibson, the same doctrine is held, and a decision in the former superior court is referred to as authority to support the opinion. In the present state of the question the propriety of lessening or increasing the jurisdiction of the justices of the peace rests with the legislature. What the true policy is remains not for this court to determine. If any question in the State is settled, this ought to be considered the one. This assumption gains strength from the consideration that the late convention has not, in the amended Constitution, made any change limiting this power of legislation; on the contrary, it is declared the laws in being and in force, and these have always been so considered until altered or repealed by the legislature, are to remain in force. This is the only view we can take of the subject, for the act of 1831, ch. 59, sec. 2, is no more in conflict with the Constitution than any one

[1] See same case, art. 1, sec. 8; art. 1, sec. 20.
[2] See Vanzant *v.* Waddel, supra.
[3] Art. 6, sec. 1.

of the previous acts extending jurisdiction of justices above twenty dollars; and the [1]act embraces this case." **16**, 446. *Morford v. Barnes.* 1835.

Power of the Judge to Direct a Non-suit.—MILLIGAN, J.: "In England, the common law courts constantly exercised this power; but no such power exists here. . . . The plaintiff has the right to have his evidence, whether slight or full, passed upon by the jury. Under our practice he has the right to judge whether his case is made out or not; and if he sees proper to let a verdict to go against him, it is his own folly, and for some purposes, as final and complete a disposition of his cause as if judgment had been rendered on a verdict found by a jury." **45**, 288. [2]*Littlejohn et al. v. Fowler.* 1868.

Compensation of Jurors—Taxing Losing Party with Costs—Act of 1875 Unconstitutional—Only Part of Statute May be Void.—The Act of February 24, 1875, entitled "An Act to tax the losing party with the jury fees in all cases in civil suits and to repeal sections 4036 and 4037 of the Code," was considered in this opinion. NICHOLSON, J.: "The Bill of Rights guarantees to all citizens the right of trial by jury, unimpaired and without violation. This manifestly means that the right shall never be embarrassed or encumbered with conditions, which, in their practical operation, may impair or violate the free and full enjoyment of the right. Under the Act of February 24, 1875, no discretion is left to the litigant. He must exercise his right, if at all, upon the condition that the jury is to be paid for their services by the losing party. In many cases this condition may, in practice, and probably would, defeat the enjoyment of this right. We fully appreciate the patriotic motives which influenced the legislature in the passage of the act under consideration. It was manifestly designed to diminish the burden of taxation by shifting the expense of jurors to the losing parties in civil causes. In that view we do not assume to question its wisdom. But the responsibility is devolved on this court to protect the Constitution from infraction, and, as far as in our power, to preserve the right of trial by jury from violation or impairment. While we are at all times reluctant to differ with a co-ordinate branch of the government as to its constitutional powers, yet, when such difference does exist, we can only discharge our duties by promptly interfering for the preservation and protection of the Constitution. We are, therefore, constrained to hold the first section of the Act of February 24, 1875, ch. 7, unconstitutional and void. It is observed that the second section of the act under consideration repeals sections 4036 and 4037 of the Code. These sections provide for the making out

[1] Jurisdiction of justices has since been extended. See M. & V., 4898. See, also, **13**, 268, and **17**, 417.

[2] Citing **2**, 58; **15**, 134; **20**, 331.

by the clerk of lists of the jurors, to be delivered to the County court clerk, on which warrants are issued to the several jurors, which warrants are made payable out of the county treasury. It is well settled, that part of a statute may be unconstitutional and void, while the residue may be valid. But where part only of a statute is void, and the residue so dependent upon and connected with the void part, that it can not be presumed the legislature would have passed one without the other, then both are void. Sedg. Con. Law, 413; Commonwealth *v.* Hitchings, 5 Gray, 482; State *v.* Wheeler, 25 Conn., 250. It is entirely manifest that the repeal of sections 4036 and 4037 was a mere consequence of the passage of the first section. Indeed, the first section would have operated by implication as a repeal of these two sections. It follows, that the entire Act of February 24, 1875, is null and void, as if it had never passed, and that sections 4036 and 4037,[1] and any others repealed by the Act of February 24, 1875, are still in full force." **63**, 179. [2]*Neely v. The State.* 1874.

Demanding a Jury in First Pleadings Tendering Issue—Waiving Trial by Jury—Amendment of Pleadings.—The [3]Act of 1875, ch. 4, providing the way in which a jury shall be demanded, was considered from a constitutional standpoint in this opinion by COOPER, J.: "The act . . . carefully secures to the citizen a jury trial upon his demand. The object of the legislature, as shown by other provisions of the statute, was to diminish the expense attending the administration of justice; for, while giving the circuit judge the power of determining at what time of the term the non-jury docket shall be disposed of, it expressly provides that during the period of its disposition no jury shall be in attendance. Neither the letter, nor the intention of the act, therefore, can be said to be violative of the Constitution, unless it be held that any provision on the subject would be unconstitutional. But it could not seriously be insisted that suitors might not waive the right of trial by jury, if they saw proper so to do, or that an agreement of waiver once entered into would not be obligatory. The act does no more. It only declares what voluntary acts of the parties shall be deemed an agreement on their part to waive a trial by jury. And we have held at this term that it is in the discretion of the circuit judge, upon good cause shown, to allow an amendment of the pleading of either party so as to demand a jury, if the application be promptly made, and the omission to make the demand be satisfactorily explained. No application of that character was made in this case. It has long been the settled law of this State, that the legislature may impose reasonable conditions on the exercise of the right of trial by jury, the most notable

[1] M. & V., 4812, 4813.

[2] See same case, art. 1, sec. 21.

[3] M. & V., 3602; also **71**, 116.

instance of which is found in the extension of the jurisdiction of justices of the peace to give judgment without a jury, the right to a trial by jury being, however, reserved to the party by the right of appeal. The act under consideration is clearly only a reasonable regulation, with a view to the public interest, of the right of trial by jury, not a violation of that right, and within the competency of the legislature." **70**, 686. *Garrison v. Hollins et al.* 1879.

Demanding Jury Trial on First Day of Term—Act of 1889, Ch. 220, Providing for, is Constitutional.—McALISTER, J., reaffirmed the doctrine "that our [1]statutes requiring litigants to demand jury trial, and regulating time and manner of making the demand, are constitutional," and held "that the demand for jury trial, though made on the first day of a trial term, is ineffectual under the provisions of our statutes, and must, upon objection, be disallowed, when it is made by mere motion in open court, without entry thereof on the trial docket, and after the case has been called and both parties have announced themselves ready for trial." **95**, 707. *McGuire v. Railroad.* 1895.

In Equity Cases.

When This Right is Taken Away—Act Referring Certain Parties to the Chancery Court Unconstitutional—Danger of Following Precedents—The Constitution a Warrant of Authority Binding Each Department of Government.—GREEN, J.: "In the case before the court the suit is upon a bond with condition faithfully to perform the duties of clerk. Of this case, it is clear, a court of equity would have no jurisdiction; but, according to the general laws of the land, it would be triable in the common law courts by a jury. The sixth article in the Bill of Rights declares that 'the trial by jury shall remain inviolable.' By the act constituting this court the causes are to be tried according to the principles of a court of equity. In courts of equity there is no jury except at the discretion of the chancellor, and after the jury find the facts upon an issue sent to them, it is discretionary with the chancellor whether his decree be governed by that finding or not. If this cause be tried upon the principles governing a court of equity, it seems to me that the defendant's right to trial by jury is violated. It is contended that the legislature may define and enlarge the jurisdiction of courts of equity; and by giving them jurisdiction of causes of action heretofore of exclusive common law jurisdiction, the right of trial by jury, although taken away in fact, is not violated in the sense of the Constitution, that instrument contemplating the existence of courts of equity without juries. If this were true, the provision would seem to be a very useless one

[1] Acts 1875, ch. 4; Acts 1889, ch. 220.

indeed. The framers of the Constitution must have seen that it would be in the power of the legislature to frustrate the provision altogether in civil cases by transferring them all to courts of equity, and thereby dispensing with a jury; or if, as the argument is, courts of equity were to have concurrent jurisdiction of all cases, it might result in the exclusive jurisdiction of that court at the option of the plaintiffs. But there is no ground upon principle to prevent the giving of exclusive jurisdiction of all cases to the courts of equity, if it be once conceded that they can acquire concurrent jurisdiction with the common law courts of causes properly and exclusively triable in the latter courts. Under this view of the case we are considering, it becomes one of deep solicitude and vast importance. The trial by jury has been considered, in England and America, as the most distinguishing badge of liberty. Great solicitude was manifestly felt upon the subject by the framers of our Constitution. In the ninth article of the Bill of Rights it is secured in criminal cases, and in the article before referred to, it is secured in civil cases. And so great was the solicitude which was felt on the subject that in the fifth article and fifth section of the Constitution a provision is introduced (in order that the judges may be prevented from the exercise of any influence on the minds of the jury) expressly requiring that the charge of the court should only state the evidence and declare the law. Can it be believed that all this solicitude and caution were manifested in relation to a provision which would, according to the agreement, be wholly defeated by transferring the jurisdiction to the Chancery courts? I can not so consider it." . . .

PECK, J.: "Does the action in question, in effect, deprive the parties of the benefit of a trial by jury, and therefore conflict with the sixth section of the Declaration of Rights? The right of trial by jury is not in express terms taken away by the act. It may be implied that the common law right of trial by jury in this, being a civil case, is taken away by that part of the act which directs the court to proceed according to the principles of equity. Still, from the last clause of the act, as one of the judges sitting under it, I would deny no man the trial of the facts of his case, an issue being tendered, by an impartial jury. The Constitution and the law both being before me, I would, as far as possible, construe the latter in such way as to make it consistent with the former, and give to the parties in this particular what is common to all other suitors. The rules that I would adopt should not be arbitrary; at least, I would endeavor to guard against appearances that might justify the imputation. But while I say this, I am free to own that an act which gives such extraordinary powers, powers so nearly bordering on discretion, so speedy, so summary, and so regardless of forms, ought certainly to be regarded by the judge with circumspection; under it he should move with caution and hesitation, especially if it have the appearance of pointing singly to its object.

"It might indeed be said, and with much propriety, that the right of trial by jury is taken away when it is not contemplated that an issue should be made, and the means of procuring a jury is not provided. Honest judges might differ as to the propriety, or even possibility, of calling a jury under the act; and a doubt upon a point so important ought to induce the judges here to turn the cause over to that tribunal where the jury can not be denied."

KENNEDY, J.: "The right of trial by jury has, at all periods in the history of this country and of England, been held in high estimation, and the framers of our Constitution, not content to secure it by the use of the words employed in Magna Charta, '*per judicium parium suorum*,' and contained in the section of the Bill of Rights just referred to, have expressly inserted a provision on that point. . . . This right is not secured to these defendants by this statute. Whilst all other persons indebted to the bank by common law obligations or otherwise, of whom there is a vast number, and all other persons indebted to private individuals throughout this community are permitted to litigate their debts and other controversies before the courts of common law, where the right of trial by jury is secured and enjoyed, this defendant and a few others are referred to this forum, and subjected to a mode of proceeding unknown in any other tribunal, and to which no other citizen is subject. If this be not a violation of the right of trial by jury, I know not what is. It is said by the counsel for the bank that the legislature has passed many statutes similar to this, where the right of trial by jury has been taken away; and the various cases where judgment upon motion has been authorized are referred to. I acknowledge the force of the authority of adjudication upon analogous cases. It oftentimes presents a forcible and conclusive argument. But it is a sufficient answer to the argument upon this point, to say that the cases and decisions referred to, though analogous, were not made in this precise case; and I can never follow precedent, in the line of analogy, when it leads to an infraction of the Constitution. Hence the necessity of a frequent recurrence to first principles. If we follow precedent, and move on according to the analogy of cases, we shall be led from step to step until the Constitution itself will be lost amidst the subtleties of the law. When precedent is established in the construction of statute or common law, I concede the propriety of following it, unless flatly absurd or unjust. But every judge and other public officer, when called on to do an official act, must judge of the Constitution for himself; for no precedent, however grave, and no adjudication, however respectable, can warrant a violation of that sacred instrument. In point of fact, courts presume that every act of the legislature is constitutional. From a deference to the legislative department of the government this presumption necessarily arises. Legislators are under the same obligation

to observe the provisions of the Constitution that is incumbent on the judges and other public officers of the land. But so long as the judiciary is a separate and independent branch of the government, it must result, that if a legislative act should be plainly and obviously opposed to the letter and spirit of the Constitution, the judiciary is incapable of observing the injunctions of the statute, and regarding the Constitution at the same time. One or the other must be dropped; and as the Constitution is paramount to any law the legislature can make in opposition to it, the judges are left without any alternative. All the departments of government are equally bound by the Constitution. It is the warrant of attorney, or authority, under which all must act. So far as that authority is exceeded the act is void. But this excess should be plain and obvious, for it is the duty of the courts to reconcile the provisions of a statute with the Constitution, if by a fair construction it can be done. But when they cannot do that, and the statute is plainly and clearly repugnant to the true spirit of the Constitution, it is their duty to maintain the Constitution, and declare the statute void." 10, 604, 623. [1]*Bank of the State v. Cooper et al.* 1831.

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[1] See same case, art. 1, sec. 8; art. 1, sec. 20.

SEARCHES AND SEIZURES.

ART. 1, SEC. 7. That the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted. [Same as Const. 1834, art. 1, sec. 7; Const. 1796, art. 11. sec. 7.]

Municipal Corporations Can Not Depart from These Fundamental Principles — Implied Powers to Pass By-Laws — U. S. Constitution. — COOPER, J.: "A marked peculiarity of our race has been a disinclination to have the private affairs of the citizen laid open to the public, except where it was imperatively required for the public welfare. This feeling has caused the insertion into the Constitution of the United States of its Fourth Amendment and worded the seventh section of the Bill of Rights of our State Constitution. 'The right of the people,' says the former, 'to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated.' . . . Whenever the public welfare demands a departure from these fundamental principles of individual liberty and common right, it is for the legislature of the entire commonwealth to determine, and to prescribe the mode and limits of the departure. The right can not be conceded to a municipal corporation, at any rate in the absence of a special legislative grant. The 'general welfare' clause, as it has been called, of a municipal charter, will not authorize an ordinance in advance of State legislation. . . . No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts either with the National or State Constitution, or with the statutes of the State, or with the general principles of the common law adopted or in force in the State. Ordinances must be consistent with public legislative policy, may regulate, not restrain trade, and must not contravene common right. These are general principles universally recognized, and, to some extent, illustrated by our own cases." **75**, 134. *Long v. Taxing District of Shelby County.* 1881.

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ART. 1, SEC. 8. That no man shall be taken or imprisoned or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.[1] —[Same as Const. 1796, art. 11, sec. 8. Same as Const. 1834, art. 1, sec. 8, except that the word "free" appears before the word "man" in that instrument.]

JUDGMENT OF PEERS.

In Cases of Freehold.

Bond of Clerk—Forfeiture of Office—Right to Be Restored—Legislature May Pass Laws Not Prohibited by Constitution.—Upon a failure to give a new bond, after being served with notice to do so, Evans was removed from the office of County court clerk and a successor elected. Evans, after giving notice, moved the court for a mandamus to restore him, which was refused and an appeal taken to the Supreme court. On his right to be restored the court said: "He may be removed on conviction by a jury of any such act or omission as amounts to a misbehavior, for which by law he may be removed. May the act or omission be ascertained by the court? If it occur in court and appear on the records

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[1] In the case of State *v.* Claiborne, **19**, 332, decided in 1838, GREEN, J., held that: "Free blacks are not citizens within the meaning of the provisions of the Constitution of the United States, art. 4, sec. 2, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' (But see now the Fifteenth Amendment to the Constitution of the United States, and State Const. of 1870, art. 1, sec. 33, and art. 4, sec. 1.) . . . Nor does such a statute violate the Constitution of Tennessee, art. 1, sec. 8, providing that 'no free man shall be taken,' etc., for by freeman is here meant one who is entitled to all the privileges and immunities of the most favored class; and if it meant more, the provision only applies to those who are already citizens of the States; and consequently would not prevent the States from passing laws prohibiting a given class of persons from becoming citizens."

See also **5**, 167; **6**, 213; **71**, 415, and Overton *v.* Campbell, in note to art. 6, sec. 13.

of the court, it need not be ascertained by verdict any more than a fact admitted by demurrer, or established by a judgment of the court; which, being of record, can not be denied. A verdict can not falsify that which appears of record, nor make it more undeniable; and the only question is, whether the [1]Act of 1811, ch. 47, be opposed by the Constitution. For if it be so, it was void *ab initio.* The legislature may pass all laws not forbidden by the letter or spirit of the Constitution. It is not against either to prescribe the duties of a clerk; that has been done by numerous acts, dictated by public necessity or convenience, ever since clerks were first directed to be appointed. The legislature may declare what act or omission shall amount to a forfeiture of his office, as it did by 1794, ch. 1, sec. 50; 1811, ch. 17, sec. 1; 1796, ch. 7, sec. 10. It may enact for the public security, that not giving new security, when the old becomes incompetent, shall be a failure of duty which shall vacate the office. 1812, ch. 16. Why not? And why may it not enact the same for the safety of individuals, whose welfare, as a part of the people, the legislature are as much bound to provide for as for the whole? The welfare of all consists in the safety and welfare of each. No principle exists which renders the law of 1811 unfavorable to the principles of freedom, to induce the court to draw it possibly within the equity of constitutional prohibitions." 4, 28. *Evans v. The Justices of Claiborne County.* 1816.

Clerk County Court — Removal — Mandamus — Previous Conviction — Meaning of "Law of the Land."—HAYWOOD, J., held: "If a clerk of the County court be improperly removed, and a successor appointed, a writ of error will lie to take the case to the Circuit court for revision, as well as a mandamus to compel restitution. And the judgment of removal in such case would be erroneous, if made without notice to the clerk of the intended proceedings to remove him; or, before the latter part of the last day of the term, under the Acts of 1817, 132, and 1819, 133. But, it is not necessary that there should be a previous conviction of delinquency by indictment, although he has a freehold[2] in his office under the Constitution of 1796, art. 5, sec. 10, the tenure being during good behavior, of which he can not be deprived, under section 8 of the Bill of Rights, but, by the judgment of his peers, or the law of the land. These words, 'judgment of his peers or law of the land,' mean by the verdict of a jury in case of disputed facts, or where the facts are otherwise legally apparent, by the judgment of a court legally constituted. Nor would it be illegal or unconstitutional to say that the clerk may be proceeded against, both civilly and criminally, *diverso intuitu;* civilly, for the purpose of removal; and, criminally, for the purpose of pro-

[1] H. & C., vol. 1, p. 304; Code 1858, 785 et seq.; T. & S., 785 et seq.; M. & V., 973 et seq.

[2] Not so under present Constitution.

nouncing a judgment of disqualification, after conviction on indictment." 7, 335. *Sevier v. Justices of Washington County.* 1824.

Freehold—Rights and Privileges of Individuals.

Judgment for Money by Motion, With and Without Notice—Regulation in Discretion of Legislature.—HAYWOOD, J.: "As there is one question made in this cause relative to the trial of disputed facts upon a motion for judgment on a prison-bounds bond, which affects very materially all laws[1] authorizing judgments instanter upon motion, sometimes with notice, and sometimes without notice; it is, therefore, a question of the greatest moment, and deserves to be settled with the most cautious circumspection; for, as in all of them disputed facts arise to be determined before judgment can be given, and, as the reference of those facts to jurors would instantly subject the proceedings upon such motions to all the delays incidental to other actions, the effect would be to render them as dilatory as other proceedings are, and to defeat completely the views of the legislatures which passed them; for immediately it would become the practice upon all such motions to make allegations of facts, to be referred to juries, without regular pleadings and precise issues, and without knowing to what points the evidence of the parties was to be directed; for want of certain issues each party would be obliged to come prepared with evidence to any fact which could possibly be alleged, and perplexity would be endless; instead of the remedy by motion being short and easy, it would be lengthened and interminable. Such inconveniences can not be viewed without concern, nor without exciting a high degree of solicitude. Disputed facts may arise on prison-bounds bonds; probates of wills, as conducted before the Act of 1789, ch. 23; petitions for legacies, filial portions, and distributive shares of interstates' estates; appeal bonds; certiorari bonds; stay bonds; injunction bonds; motions against sheriffs, clerks, and constables; motions against public and county treasurers, and all collectors of public moneys; motions by sureties against their principals, and every disputed fact in all matters of chancery jurisdiction, would be no longer triable, as it has been for many years past. There would be an instantaneous revolution in all these proceedings, and in those against delinquents who failed to pay their public or county taxes. Such being the consequences of the argument advanced on the present occasion, the same should be fairly met; and the law upon the subject should be fairly ascertained and applied; and this is the more indispensable, as the acts for proceeding to judgment by motion, have greatly increased in modern times. As the acts themselves do not direct issues and the reference of facts to juries, and, indeed, do not contemplate or provide for it; and, as courts

[1] See M. & V., 4338, et seq. Bank *v.* Cooper, art. 1, sec. 20.

can not add a provision, which it is the intent of all such laws to exclude, then, either the acts themselves must be abandoned or they must be carried into effect, as they are written, according to the wishes of their makers. There is no alternative but to execute or reject them.

"The sovereign legislative power of Tennessee, like the sovereign power of all other States, of whatsoever character they may be, may do all things, not naturally impossible, which it deems promotive of the public welfare, except in such instances where, by the fundamental law of the nation, written by the mighty hand of the people, it is forbidden. And in any instance where legislative power is questioned it bounds over opposition, unless a restriction upon that power in the particular instance can be clearly pointed out. The restriction, to make laws for judgments upon motion, and for the trial of disputed facts without a jury, is supposed to be contained in this section.

"Is the judgment to be pronounced against him in the establishment of certain facts, that he is to be taken into custody, or that he shall be imprisoned, or that he shall lose his privileges as a citizen, or that he shall be outlawed, or exiled, or that he shall be destroyed or suffer death? He has a right to be tried by his peers, and of this right he can not be bereaved by any act of the legislature. Is the judgment to be that he shall lose his freehold, or his corporate rights, or his personal property? He has a right to a trial by jury of all the controverted facts in the cause in which that judgment is to be pronounced. The right to a trial by jury in all these instances, is too sacred to be intermeddled with by any power upon earth, too inseparable from human happiness to be submitted to the discretion of any human legislature; it stands upon eternal foundations, and as time grows old it grows in veneration and stability. The trial by jury is likewise made indispensable, whenever punishment is to be inflicted, whether corporal, infamous, or pecuniary; for by art. 11, sec. 14, every criminal charge is to be prosecuted by indictment or presentment, which *ex vi termini* implies a trial by jury. In all these instances the trial by jury can neither be changed nor impaired in perpetuity, unchangeable, unalienable, and inseparable; but in cases where the trial by jury is not so necessary to the welfare of the citizen, and may be dispensed with without endangering his independence or safety, then the legislature is left free to choose the course most suitable to existing circumstances; and like other legislatures, ours may exercise its judgment in the adoption of modes of trial, best suited to the subject. In matters not heretofore tried by jury, such as matters of equity or of ecclesiastical jurisdiction, which experience showed might be safely left with a judge, the legislature may regulate them according to its discretion, for what temptation could it have to choose modes which were not the best for the people? Improvements in science, and change of circumstances,

might render new modes more eligible than the old ones; and it were unwise so to shackle the legislature that it could not use the lights which experience in its progress might discover. In all instances, the discernment and the patriotism of the legislature are relied on by our Constitution, except in those which were of too much value and importance to be left to human discretion. In all instances, therefore, where the legislature has prescribed a proceeding by motion to obtain judgment for moneys due from public or private delinquents, where the judgment to be pronounced will not directly or immediately affect the individual rights and privileges secured to the citizens by the articles and sections under consideration, the trial of facts may be without the intervention of a jury, if such be the meaning and intent of the law which it makes. Sevier's office was a freehold, and the university lands were also freeholds and vested property. The decisions in these cases were not incompatible with those of 1 Haywood, 29, and 5 Haywood, nor with the opinion which the court is now giving, nor with the laws made for judgments upon motion, which do not affect any of the rights which are placed under the protection and guardianship of the trial by jury. The judge of the Circuit court, therefore, did not err in hearing and deciding upon the facts of the case himself." 7, 417. [1]*Tipton v. Harris.* 1824.

Constable—Removal from Office by County Court Without "Presentment or Indictment"—Common Law Power of Removal—Law of the Land—Art. 1, Sec. 14; Art. 5, Sec. 4.—CATRON, J.: "Before our Revolution there can be no doubt that all the common law rules applied to constables, and that the County courts, having the power to appoint, had the power to remove, to the same extent the courts of quarter sessions of England had at the time of the passage of the Act of 1741. . . . It is contended, on the part of the defendant, that by this section of the Constitution he was entitled to the 'judgment of his peers' before he could be deprived of his privilege of constable, because he was proceeded against for a misdemeanor in office. This doctrine will not bear the test of examination, even by the most visionary theorist, much less when applied to the practical concerns of life by lawyers and men administering the government necessarily by acts, and not words. Suppose the constable was convicted of forgery, bribery, or felony of any kind, would the Circuit court, who rendered the judgment upon the conviction, be authorized to remove him? Where is the statute or common law to be found that gives the power to render such judgment? No one will pretend that it exists. The constable is, and for centuries has been, recognized as an officer of the County or Sessions court; and he is [2]removable, for this reason, by that court, upon evidence, legal in

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[1] Overruled on another point by Burroughs *v.* Goodall, 39, 30, which see.

[2] T. & S., 400, 401; M. & V., 457, 458.

its character, that proves to their satisfaction that he is corrupt, and unfit to fill the appointment. All the rights enumerated in this section of the Constitution, it is contended, must be taken from a free man by the judgment of his peers. Let us examine if this is the true construction. No free man shall be taken or imprisoned, but by the judgment of his peers; if so, the man guilty of murder and every other crime could not be apprehended; peace warrants could not issue; bail, in civil cases, could not be taken; the mob who despoiled the sanctuaries of religion and justice could not be arrested in its ravages; a contempt could not be punished, although the offender dragged the judge from his seat.

"Secondly, 'no free man shall be disseized of his liberties or privileges, or his property' but by what—the judgment of his peers? Certainly not, for this would destroy all the powers of the courts of chancery, which every day deprive men, by process, of their privileges, liberties, and property, and disseize them of their freeholds, and yet act within the pale of the Constitution; because justice is administered according to 'the law of the land.' Had this latter clause been left out of the Constitution, the government could not possibly be administered. M'Connell *v.* Weaks, 2 Tenn. Rep. 219. This section was copied from Magna Charta, ch. 29 (2 Inst., 45), and was the law of the land at the time of the adoption of the Constitution, as the Acts of 1715 and 1778 show, to the same extent it now is; yet that part of Magna Charta was within the reach of legislation, beyond which the convention placed it. The construction of this section of the great charter of the liberties of Englishmen (and, since our Revolution, of all the people of the United States of America) has, for centuries, put to rest the question whether the courts have power to punish for contempts, and regulate their own officers, or remove them in particular cases; as will be seen by examining the Com. of Lord Coke, 2 Inst., 45; Sullivan's Lec., 247; 1 Hum. Hist. Eng., 450; 6 Henry's Hist. Eng., 79, 80. Hence this part of the Constitution does clearly not stand in the way of the exercise of the common law power of removal.

"But it is contended that the fourteenth section of the eleventh article precluded the County court from proceeding otherwise than by presentment or indictment, the defendant being criminally prosecuted. To this argument it is a sufficient answer to say, that the proceeding to remove was not of the criminal nature contemplated by the Constitution; that a removal from office for an indictable offense is no bar to an indictment, conviction and punishment for the same offense. The argument proves too much when it affects to maintain that there must be a conviction for the extortion before there can be a removal from office; and that the removal must be predicated upon the conviction. Now, if the removal was a punishment, in its nature criminal, the defendant would

be first fined and imprisoned for extortion, and then punished a second time for the same crime, which is contrary to all law. The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment, instituted upon the same facts as the Constitution of this State, art. 4, sec. 4, Brownshall's Case, Cowp., 829, and King *v.* Southerland, 6 East, 152, fully prove. Even had Fields been acquitted by the jury, and the court had discovered, from the facts proved upon the trial of the indictment, that he was guilty of corrupt practices in a manner not amounting to extortion, yet I have no doubt it would have had the power to make an order of record, calling upon the accused to show cause why he should not be removed from his office; and upon due notice he might have been removed, either upon proof by witnesses, or upon the facts appearing upon the trial of the indictment. In many matters coming before the court it must of necessity exercise its legal discretion; for instance, in taxing costs, if the defendant is thought guilty, although acquitted by the jury, by the Act of 1817, ch. 184, sec. 2, or in taxing the prosecutor by the Act of 1813, ch. 136, sec. 3, the court judges of the facts, and gives judgment against the defendant or prosecutor, upon which a *fi. fa.* or *ca. sa.* may issue without the privilege of the party being tried by jury; and property, liberty, and supposed privilege are taken away by the court alone, and yet the Constitution is not violated. The same may be said in the numerous cases where judgments are rendered upon motion; but all this is done by 'law of the land.'" 8, 173. *Fields v. The State.* 1827.

Where Liberty and Property Are Involved.

Fathers of Bastard Children—Warrants for Their Arrest—Decrees Against Their Property.—CATRON, J.: "By the [1]Act of 1741, ch. 14, sec. 10, the person charged by the woman before the justices was to be adjudged the reputed father, and nothing further was to be done when the proceedings were returned to the County court but for the court to make the order for maintenance. . . . It is contended, that the court can not, consistent with our Constitution, make an order on this man without the judgment of his peers. Were this doctrine sound, the magistrates had no power to issue the warrants arresting the defendant in this case; nor could they arrest the felon, and confine him for trial, because he would be deprived of his liberty; nor could a court of chancery give a decree for property both real and personal, for this is depriving a man of his property. The English Magna Charta has the same provision, from which the framers of our Constitution borrowed it; the construction of which has been settled as early as the time of Sir Edwin Coke, who, in his reading upon this statute, tells us that the cases

[1] See, now, M. & V., 6199, et seq.: also, Kirkpatrick *v.* The State, and O'Neal *v.* The State, art. 1, sec. 6, p. 13.

in which courts act without a trial by jury or 'peers' are innumerable and undefined, being done 'by the law of the land.'" **10**, 100. *Goddard v. The State.* 1825.

Law of the Land.

Statutes Affecting Personal Liberty.

Statute Fixing a Penalty for the Misdeeds of Employee of a Particular Bank Void Because a Partial Law.—Reese, J.: "The prisoner was indicted for making a false entry on the books of the Union Bank with the intention to defraud the bank. The indictment is founded upon the twenty-second section of 'An Act to charter the Union Bank of the State of Tennessee,' 1832, ch. 2. That section enacts 'that if the cashier or any other of the officers, etc., or servants of said corporation . . . shall make false entries upon the books of said bank, with intent, . . . said officer, agent or servant shall be held . . . guilty of felony, and shall upon conviction thereof, be sentenced . . . for a period not less than five nor more than twenty years.' . . . The 'question is whether, in reference to our Bill of Rights, the twenty-second section of the act referred to can be regarded and enforced as "the law of the land."' The section twenty-two . . . is to be regarded as if it stood alone; and as if, aloof from all connection with the charter of the Union Bank, it had been a statute of one section, enacted after that institution had full corporate existence, with a view to make the felony in question, affecting the officers, agents, and servants of that institution. It is an act, then, creating a new felony in relation to the officers, servants, and agents of the Union Bank, and to them only. Is this a 'law of the land' in the sense of our Bill of Rights? Law, to use the definition of Mr. Justice Blackstone a little modified to suit the genius of our institutions, 'is a rule of civil conduct prescribed by the law-making power of the State, commanding what is right or prohibiting what is wrong.' This, then, is a rule of conduct prescribed by the legislature, and directed to the officers, agents, and servants of the Union Bank, prohibiting them from doing what is wrong. What is the Union Bank? It is a legal person, having capacity to sue and to be sued; to own property, and to employ agents and servants. This, then, is a rule mandatory to the servants and agents of this legal person. It expends all its force upon them. This statement of the question, merely, goes far, it seems to us, to supersede the necessity of elaborate reasoning on the subject. Not, indeed, upon the ground that the officers, servants, and agents of this legal person, the bank, are more or less numerous, but because the officers, agents, and servants of this person only, and not of any other persons, are comprehended or affected. If the felony were enacted with regard to the clerks, servants, and agents

of a merchant, to deter them from embezzlement and false entries, would it be imagined, for a moment, that it would be regarded as the 'law of the land,' and consistent with the Bill of Rights?

"If the felony affected only all the clerks of all the merchants of Nashville, or of Davidson county, or of Middle Tennessee, would that, in either case, be 'the law of the land?' It is believed none would so contend. And why not? Simply because the law of the land is a rule alike embracing, and equally affecting, all persons in general, or all persons who exist, or may come into the like state and circumstances. A partial law, on the contrary, embraces only a portion of those persons who exist in the same state, and are surrounded by like circumstances. If peculiar felonies, affecting all the people, or certain of the public officers of East Tennessee only, were held to be the 'law of the land,' it would be difficult to say for what object that clause was inserted in the Bill of Rights. One of its objects has been stated, in various adjudications in our State, to have been to protect the feeble and the obnoxious from the injury and injustice of the strong and the powerful, and, in general, to protect minorities from the wrongful action of majorities. This being its scope and purpose, would it not interdict the legislature from passing such an act as is last above referred to, for instance, creating certain acts of non-feasance or malfeasance of the register of the Western District, although a public officer, a felony, leaving the register of Middle Tennessee, East Tennessee, etc., unaffected by it? Certainly it would. And why? Because the law would not treat similarly all who were in like circumstances; it would therefore be partial, and of course not the law of the land.

"At the time of the enactment of this statute, there were other banks having actual corporate existence, as we can see from our statute book, with like faculties and functions. They were not embraced; other banks had a potential existence; that is, the legislature had power to make others. The act, however, embraces the Union Bank alone and its servants, etc., and not all who are, or may be, in the like state and circumstances. If, as in Alabama and Arkansas, the legislative power being constitutionally expended by the creation of one bank, a felony had been created, limiting itself in its terms to the bank established, we do not doubt that under such a Bill of Rights as ours, such law would be constitutional. We do not think the law in question partial, because merchants' clerks, or the public officers called clerks, were not embraced; but because the officers, agents, and servants of banks in general, persons in like situations and circumstances, were not embraced. It matters not how few the persons are; if all who are or may come into the like circumstances and situations, be embraced, the law is general, and not a partial law. The principles here set forth are not new in this State; they are little more than the reannouncement of what is said in

2 Yerg., 260, 554, 599; 4 Id., 202; 5 Id., 320; Jones *v.* Petry, 10 Id. Those cases, indeed, refer themselves to the operation of partial laws upon civil rights and remedies, while this case happens to be the application of our Bill of Rights to a partial law creating a felony. But the principles are identical, and there is certainly no reason why the protection intended to be extended to individuals by the Bill of Rights should not be as effective, where their liberty, as well as their property, may be exposed to the operation of a partial law." **22**, 490. *Budd v. The State.* 1842.

Working out Costs Accruing After Conviction for Clothing and Other Necessaries — Act Containing this Provision Void. — McFarland, J., held that "The act of 1875, ch. 83, which provides that the convict be further held in the workhouse, after working out the imprisonment affixed by the jury, and all the costs in the case to work out; 'also, all costs which may accrue after conviction for clothing and other necessaries' was unconstitutional. In delivering the opinion he said: 'Suppose, after the convict has been imprisoned a time sufficient to pay the costs in the case, the superintendent of the workhouse assumes the right to hold him a still longer time to work out the cost of clothing furnished, and the convict denies the right, denies that the clothing has been furnished or received by him, denies the cost or value charged by the keeper. Where is his remedy? He has never had an opportunity to be heard upon these questions, no court has passed judgment upon these disputed facts. His keeper says the cost of necessary clothing furnished is ten dollars, and that the convict shall serve forty days, and to this imprisonment he is condemned without a hearing, and condemned by a tribunal unknown to the law, and left without a remedy, unless it be by writ of *habeas corpus;* but the Constitution does not leave him to this remedy. He should be condemned first, and not first imprisoned and afterwards left to obtain his discharge, if not willing to submit. The remedy of *habeas corpus* in such a case would be without the trial by jury, to which the defendant was entitled." **68**, 207. *Knox v. State.* 1877.

Imprisonment at Hard Labor Not Cruel Nor Unusual — Discretion of the Judge in Certain Misdemeanor Cases. — M. & V., 6259, reads as follows: "In all cases where a person is, by law, liable to be imprisoned in the county jail for safe-keeping or punishment, confinement in the workhouse, if one be provided, may, in the discretion of the court or justice, be substituted."

Lurton, J.: "Where the conviction is for a misdemeanor, and the punishment is not prescribed by statute, the trial judge may punish by a fine not exceeding fifty dollars, and imprisonment not exceeding one year, either or both in his discretion. This is well settled and does not

violate any constitutional privilege. Atchison *v.* State, 13 Lea, 275; 7 Cold., 726. Thus, a wide discretion is imposed in the magistrate, and he is enabled to graduate punishment with some regard to the circumstances of the particular case. That this discretion as to the nature and duration of punishment may be committed to a judge without violation of the constitutional proviso above quoted, is due to the fact that at the common law the kind and extent of punishment, in the absence of a statute prescribing the punishment, was left to the trial judge. So the ancient statutes prescribing punishments very frequently fixed a limit and permitted the judge, within such limit, to determine the punishment. In either case there is no violation of the right of trial by jury. The guilt of the defendant has been determined by a jury, and the law attaches to the verdict the punishment prescribed by the judge if within the limits prescribed by law. Statutes prescribing imprisonment for felony not to exceed a certain number of years, and with or without hard labor, in the discretion of the court, are by no means unusual, and we have been unable to find any authority questioning the validity of such statutes. It is not easy to understand why a judge may, in his discretion, inflict imprisonment not exceeding one year, and yet may not be empowered to add labor as a part of the sentence. Hard labor is not an unusual or a cruel punishment." 89, 733. *Durham v. The State.* 1891.

Statutes Affecting Rights and Privileges.

This Provision Introduced to Secure the Citizen Against Abuse of Power by the Government—Restraint Upon Legislation—Danger to Minorities—Act Taking Away Rights of Appeal and Trial by Jury—Jury in Chancery Court—Magna Charta—Special Tribunal—Particular Class of Debtors.—"By the Act of 1829, ch. 95, a court was directed to be holden at Nashville, to consist of a judge of the Supreme court, a chancellor, and a judge of the Circuit court, with power and authority, upon complaint being made by the bank, to hear and determine all cases against the officers of the bank and their sureties, and against persons who may have overchecked, and thereby become defaulters to said bank. The court was empowered, by the act, to hear evidence and to determine the cause according to the principles of a court of equity. The court was declared to be supreme within its sphere of action, and that no appeal lies from its decision. On the 2d of October, 1820, Charles Cooper was appointed clerk of the bank, and at the same time he entered into bond with securities, for the faithful and correct discharge of his duty; he continued clerk until January, 1822, when he was reappointed, during which time he . . . received its funds to a large amount, and applied them to his own use and benefit, etc. The defendants plead that Jacob Peck, Nathan Green, and William E. Ken-

nedy had no power or authority to hear, try, and determine said complaint, nor had they jurisdiction thereof, by the Constitution of the United States and the Constitution of Tennessee, and the law of the land, with an averment that jurisdiction is in the County or Circuit courts of Davidson."

In support of this plea several constitutional grounds were taken. "This decision was made by the tribunal itself," says Mr. W. F. Cooper, in a note to this case, "upon plea of the defendant to the jurisdiction. Each judge delivered a separate opinion, assigning to some extent different reasons. The original reporter and Mr. Meigs (Dig., sec. 530) concur in stating that the act was held unconstitutional, because retrospective, and therefore violative of the Const., art. 1, sec. 20; because violative of the right of trial by jury, art. 1, sec. 6; and, because partial in its operation, and not the law of the land, art. 1, sec. 8. Upon the last ground all the judges concurred, and it is upon this ground that it has been generally cited in subsequent cases." What was said with reference to each of the first two sections by each of the judges will be found in its proper place. Following are the opinions on the last subject mentioned:

GREEN, J.: "By 'law of the land' is meant a general and public law, operating equally on every individual in the community. Such is the opinion of Judge Catron, in the case[1] before referred to, and such was the opinion of Lord Coke upon the construction of Magna Charta. In his Commentary on this instrument, (2 Institute, 51), he says, that the terms 'law of the land' were used that the law might extend to all. He informs us that parliament, by an act in the eleventh year of Henry VII, violated the principles of the great charter in this particular, and that under the authority of this act, Empson and Dudley committed horrible oppressions and exactions, to the undoing of many people, but that in the first year of Henry VIII, this act was repealed on the avowed ground that it was a violation of the charter. 'And the ill success hereof,' he adds, 'and the fearful end of these two oppressors, should deter others from committing the like, and should admonish parliaments that, instead of the ordinary and precious trial *per legem terrae*, they bring not in absolute and partial trials by discretion.' If the construction here contended for be not the true one, it seems to me, that an edict in the form of a legislative enactment, taking the property of A, and giving it to B, might be regarded as the 'law of the land,' and not forbidden by the Constitution; but such a proposition is too absurd to find a single advocate.

"This provision was introduced to secure the citizen against the abuse of power by the government. Of what benefit is it if it impose

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[1] Vanzant *v.* Waddel, art. 1, sec. 6, p. 14; also this section, and sec. 20.

no restraint upon legislation? Was there not as just ground to apprehend danger from the legislature as from any other quarter? Legislation is always exercised by the majority. Majorities have nothing to fear, for the power is in their hands. They need no written Constitution, defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of the minority. They are in danger. The power is against them; and the selfish passions often lead us to forget the right. Does it not seem conclusive, then, that this provision was intended to restrain the legislature from enacting any law affecting injuriously the rights of any citizen, unless at the same time the rights of all others in similar circumstances were equally affected by it? If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others. Here is the importance of the provision and the great security it affords.

"Apply these principles to the case before the court. A particular description of the debtors of the bank of the State are assumed to be in default, and to have incurred liabilities to the bank. The right of action has already accrued, and the courts of common law have clearly exclusive jurisdiction. Here the defendants would have been entitled to a trial by jury, and to an appeal to the Supreme court. In this state of the case, the legislature passed the act under consideration, giving to this court the jurisdiction of those particular causes only; direct the mode of trial to be according to the principles of a court of equity, (which is without jury,) and declare that there should be no appeal, at the same time the law, as it regards all others, remaining unchanged.

"This law only acts upon individual cases, and is the same in principle as if a law had been passed in favor of some one merchant, enabling him, by the method therein prescribed, to take judgment against his debtors without the right of appeal. The interest which the people have in the bank is a sufficient reason why the legislature should feel a deep solicitude to secure its funds, but is no reason why they should overstep the limits of legislative authority to effect this end. Nor is it any reason why the court should enforce an act passed without sufficient deliberation, which infringes, as we believe, the Constitution. Two important privileges, the trial by jury and the right of appeal, are by this act taken away in these special cases, while every other member of the community, having incurred similar liabilities, enjoys them. The fact that the persons embraced in this act form a class of the debtors to the bank, tends no more to give it the character of a general law than if the act had operated on one individual debtor only, whose case might have some peculiarity distinguishing it from that of all other debtors. Other banks, and many merchants, and many other members of the community, have contracts similar to the one set out in this bill. In

order to have avoided the force of the objection to this act, it should have operated equally on all these; and because it has not done so, it is not 'the law of the land.'

PECK, J.: "Is the act, upon its face, partial in its provisions and personal in its application, affording advantages to one side and withholding them from the other, by such provisions as are found not to apply to other portions of the community besides those specified in the act? This is a delicate question. I am confident that the framers of the law did not intend that the act should be subject even to such a suspicion; but times do arise when men are hurried into measures, which, on cool deliberation, they might themselves condemn. Putting intentions aside, what are the provisions of this act? It provides that, touching a few individuals, the court should, by summary process, call them before the judges, and fix at pleasure the time of their appearance, put interrogatories to principals in bonds, hear testimony, adjudge and award execution against both them and their securities, for breaches of trust, indebtedness and malfeasance in office. All this the judges are empowered to do by this act, without regard to form or substance. The court is to be governed by the rules of equity. It is supreme in its sphere of action, and from its judgments there can be no appeal. . . . The duty assigned to this court is aside from the duty belonging to its members as judges; the act relates to the few specially named in it; the rules by which we are to be governed are not those common to the rest of the community; the right of trial by jury is made discretionary, if not absolutely taken away by the act, and the right of appeal is taken away in express terms; under these circumstances, is the law of the land likely to be afforded to the defendants? . . . Upon this last point I am clear that the act is unconstitutional and void."

KENNEDY, J.: "The statute contemplates the arraignment of certain particular debtors to this bank before a tribunal where no other person can sue or be sued, and to have their rights ascertained and settled by rules that apply to no other debtors of this institution, nor to any other member of the community. Does such legislation harmonize with the true spirit of our Constitution? . . . That the defendants were not intended to be subjected to the payment of these demands by the judgment of their peers before the forum is manifest. The nature and the proceedings of the organization of the court were not intended to refer the case to a jury. A jury in a Chancery court can not be constitutionally demanded by either party. It is only called, if at all, to aid the chancellor. The proceeding here is somewhat according to the course of chancery practice. It is clear, then, that under this statute they are denied the privilege of being judged by 'their peers,' as the whole matter of proof is submitted to the court. Nor is their liability to be fixed and ascertained by the 'law of the land.' No individual can be

subject to any liability but by one or the other of these two courses of proceeding, *per judicium parium suorum, nisi per legem terrae.* What is 'the law of the land?' These words are technical, peculiar to the science of the law, and must receive that construction and meaning which the science has assigned them. This is a rule well settled by the law, when technical terms are employed in any art or science. At the time when our Constitution was formed, these words have assigned to them by the law a specific and definite signification. This was known to the members of the convention at the time they employed the expression. If so, we are obliged to give them the same meaning which was known to have been assigned to them by the law at that time. For the purpose of ascertaining the import of these words, it is unnecessary to refer to their origin. The history of Magna Charta is identified with the law. The adjudications upon the instrument before our Revolution settled the meaning and signification of this expression. In the second part of Coke's Institutes, page 51, after showing various objections to the employment of other words in connection with these which might give them a partial operation, the author says, 'but that the law might extend to all, it is said, *per legem terrae*, by the law of the land.' Does this statute apply to all the citizens of the State? Does it apply to all the debtor class of society? Or to all those who are indebted to the bank? It does not. It is intended to affect only a few of those who are indebted to that institution. It can not therefore with propriety be called *legem terrae*, the law of the land. Other authorities on this point might be cited, but the universal admission of the accuracy of Coke in such learning makes it unnecessary. If it were necessary, the opinion of Judge Catron in the case of Vanzant *v.* Waddel . . . could be produced." 10, 600. [1] *Bank of the State v. Cooper et al.* 1831.

Special Act — Revivor of Judgment — Act Changing Fixed Rights of Parties Partial and Unconstitutional. — George Bell, in his lifetime, obtained judgment against M. Bell and others, which was paid to said G. Bell, except about $1,800. George Bell died; the *scire facias* does not show when; no person administered upon his estate. In 1829 the legislature passed an act authorizing the judgment to be revived in the name of Tate's executors, who claimed to be the equitable owners of the judgment. This *scire facias* has issued on that judgment, to revive it against Bell in the name of Tate's executors. Bell moved to quash the *scire facias*. PECK, J.: "At the trial term, as specified in this act, Bell appeared and moved to quash the *scire facias*, on the ground that the act, being limited and partial in its operation, is unconstitutional and void; and that, being the only authority for the *scire facias*, it is void also. It is here proper to remark, that it is with reluctance the court

[1] See same case, art. 1, sec. 6, p. 19; art. 1, sec. 20.

will declare a law unconstitutional; not from any fears of consequences which might arise from conflict of opinion with another co-ordinate branch of the government, but because the court might incline the more to doubt that opinion, where, on the same point, it may seem to have been formed upon deliberation by others officiating in a high and responsible sphere. Hence this court, in a doubtful case, would permit a law called in question to have its effect. But when the court is satisfied, there is an obligation resting upon them that it would be criminal to compromise.

"The act in question has been passed in terms directly to affect a judgment of this court. It is not passed in aid of the court, for the court, in dispensing justice, did not need the aid of it. The law, as it stood at the death of Bell, fixed the rights of the parties; the disposition of the fund expected to be raised from the judgment was governed by existing rules; these were all before us, subject to be acted upon as soon as the proper person should, under the known forms of existing law, apply to us. But by the act we are not anticipated, but superseded. We are instructed that Bell held the instrument which had been prosecuted to a judgment, as the trustee for the executors and legatees of William Tate, deceased, and the legatees of Margaret Tate, deceased; that George Bell had departed this life out of the State, insolvent; and, that no person will administer on his estate. Upon the facts thus assumed, the act 'enables' the executors of William Tate to revive the judgment in their names, as if they were the executors of George Bell, deceased. It is not at all material for this court to inquire into the truth of the facts found by the makers of the law. Supposing them all to be true, are there not others who have a right to question them? Are not the creditors of the deceased Bell entitled to their day in court? Does not the law, as it stood before the passage of this act, give them time to appear as real representatives, with all the liabilities resting upon them common to administrators, and having revived the judgment and secured the fund, await the mandate of the proper tribunal to make distribution? It is believed every lawyer will answer these questions in the affirmative. If these rights exist in others, and the law supposes they do, how can we overlook them? It is impossible. While our business is in train to come to a result between parties, those unknown to the record and existing laws are forced upon us by the operation of an act made, not as a general provision, but to reach particular individuals. This at first blush awakens surprise, if not suspicion. Facts and circumstances supposed to have existed between persons deceased are fixed and settled by the act; and, in a case where many should be heard, one party is thrown upon us with his equitable rights established.

"So long as we consider that there existed courts of equity open to the investigation of the subject of this trust, there was no necessity for

the act we are considering. Take the act as it is intended, and it will have the effect of a decree upon the rights of parties, though not upon the rights of all that must of necessity be heard, if resort to the proper tribunal was had. Hence the one-sided character of the act. Its application to a particular case makes it analogous to the case of the Bank *v.* Cooper et al. . . . The motion to quash the *scire facias* must prevail." 12, 202. *Tate's Executors v. Bell.* 1833.

Act to Revive in Pending Suit — Taking Vested Rights from Some and Giving Them to Others — Changing Nature of Obligations. — The legislature passed an act authorizing Young to prosecute a suit then pending in the Circuit court without taking out letters of administration upon the estate of Elrod, deceased. Subsequently, a rule was entered to revive in the name of Young. The rule was made absolute. Judgment for plaintiff. PECK, J.: "It is insisted the Act of Assembly is unconstitutional. The law, as it exists at the time of the death of a member of society, fixes the rights of parties; these rights should be uniform; laches or accidents may be the cause of the loss of a right which one more vigilant might save. This does not arise from defect of law; but it may arise from the neglect or misfortune of one claiming the benefit of it. It should be the business of the judge to see that the scales of justice be held with an even hand. An interference with the uniform administration of justice, directing that administration aside from uniformity, so as to give to one man rights which must be denied to another, would at once be subversive of the liberty and security guaranteed by the Constitution. This would be emphatically the case if any power but the court was permitted to direct at pleasure the rule and measure of justice in specified cases. Who would be safe if the legislature were permitted to dictate the decision of causes pending? What would be the use of courts under such a state of things? They would be mere instruments in the hands of others, and all their powers and usefulness would be paralyzed. They might make records and issue process, but the mind and independence would be gone, and with these would also go responsibility; for if the agent be not free to act, there should not be accountability; hence arises the great necessity of courts looking to their own constitutional rights and powers, and firmly disregarding all attempts at innovation upon them.

"Admit the principle, that the legislature at pleasure can take from or add parties in causes pending, and how can the court look forward to results? The obligation of the judge, 'that he will do equal law and right to all persons,' that he will delay no one of common right, by reason of any command from any person or persons in authority, or for other cause whatever; but that he will faithfully, truly and justly do equal and impartial justice to individuals and the public, are the great and mighty barriers to all encroachment upon that administration of

justice which puts citizen upon an equal footing with citizen. Who, on the death of Elrod, became instantly interested in the subject-matter litigated in this suit? The widow, the heirs, and creditors of the deceased, had a direct interest; an interest which a law uniform in its operation fixed and established. To settle the interests of all needed no legislation. The way was plain, and it was for the court to see that it was properly pursued. What is the attempt made? To disregard the rules which were general; make an excepted case of the present; substitute a person not known to the law of the land, and permit him, without responsibility, to stand in the place of Peter Elrod and prosecute the suit. It is asked, What section of the Constitution has been violated by the act in question? It is answer enough to say, that the act takes away from some their vested rights and gives them to others; changes the nature of obligations and dispenses with the liabilities which all others in similar situations would lie under. There is no aspect in which it can be viewed that does not present a strange anomally, alike conflicting with the sworn duty of the judge, the vested rights of persons and the Constitution. What is the difference between such a course and appointing a judge over the head of the legitimate and constitutional one to decide the cause? None can be perceived in principle, though, in fact, the consequences in the case before us may be the most injurious and fatal to rights. The act in question, being repugnant to the Constitution, gave to Young no authority to prosecute this suit. The judgment is, therefore, reversed." **13**, 321. *Officer v. Young.* 1833.

Private Way—Damages—Consent of Parties—County Court.—TOTTEN, J., held: "The County court has no power to compel a private person, at whose instance a private way is opened through the lands of another, to pay damages for such private way. The consent of the parties can not confer such jurisdiction. The right of a private way can only exist by prescription or convention between the parties, and not by judicial compulson. The Act of 1811, ch. 60, which authorizes the construction of private ways, upon the petition of any persons whose lands may be surrounded by the lands of another, upon petitioners paying damages, is repugnant to the Constitution, as violative of private right." **33**, 53. *Rice v. Alley.* 1853.

Registration Certificates—Power of Governor to Annul—Elective Franchise—Persons Having the Right to Vote Can Not be Deprived of it Except by Due Process of Law.—SMITH, J.: "The elective franchise is a right which the law protects and enforces as jealously as it does property in chattels or lands. It matters not by what name it is designated—the right to vote, the elective franchise, or the privilege of the elective franchise—the person who, under the Constitution and laws of the State, is entitled to it, has a property in it, which the law maintains

and vindicates, as vigorously as it does any right of any kind which man may have and enjoy. The rules of law which guard against deprivation or injury, the rights of persons in corporeal properties, are alike and equally applicable to the elective franchise, and alike and equally guard persons invested with it, against deprivation of, or injury to it. Persons invested with it, can not be deprived of it, otherwise than 'by due process of law.' To the same extent that persons can not be deprived of their lands and chattels, or rights and franchises of any kind, otherwise than 'by due process of law,' is it also true, that, 'without due process of law,' they can not be deprived or divested of the muniments which evidence and establish their titles and rights, such as deeds, bills of sale, bonds, promissory notes and the like; and the certificate of registration, and right to vote, may be properly included in the category."

The court held that the act enabling the Governor to defeat and annul registration certificates, and the right of the qualified citizen to the franchise, was in violation of this section, also in violation of art. 2, sec. 2. **46**, 243. *State v. Staten.* 1869.

Third Verdict of Jury — Court Shall Not Set Aside — Opinion of Federal Supreme Court. — SNODGRASS, J., held that sec. [1]3835, M. & V. (T. & S., 3122), forbidding courts to set aside third verdict of jury when thus construed is constitutional. In delivering the opinion he said: "The statute was . . . applied by us at Jackson, in 1889, in the case of [2]Louisville & Nashville Railroad Company, in error, *v.* Woodson, now reported in 134 U. S., 614 (Lawyers' Coop. Ed., book 33, page 1032). In that case the court determined that there was *no evidence* to sustain the verdict, but being a third of which the first and second had been set aside on the merits, the statute was held to prevent reversal. The railroad company carried the case before the Supreme court of the United States, insisting that the statute was void under the Fourteenth Amendment to the Constitution of the United States, providing that no State shall pass any law which shall deprive any person of life, liberty, or property without due process of law—this court, after giving the act the construction stated, having adjudged that it was not in conflict with such Amendment to the Constitution. This was the first time this constitutional objection was made to the statute, as appears from the reported cases cited. The Supreme court of the United States held that the act bore no such construction. It said (after quoting many Tennessee cases, including several of those we have cited): 'From these decisions it is clear that in Tennessee, as elsewhere, although the jury are the judges of the facts, yet the judge has power to set aside the

[1] Acts 1801, ch. 6, sec. 59; H. & C., p. 229; Code 1858, 3122, p. 590.

[2] Not in Tennessee Reports.

verdict when in his judgment it is against the weight of the evidence, but that that supervisory power can not be exercised under the statute when the triers of the facts have three times determined them the same way. This manifestly refers to a state of case where, in the opinion of the judge, the verdict should have been otherwise than as rendered, because of the *insufficiency* of the evidence to sustain it, but not to a case where there is no evidence at all. . . . Tested by this rule, whenever the statute is applied, it must be upon the assumption that although the court would have found a different verdict because of the weakness of the evidence, yet there was some evidence tending to establish the cause of action. . . . We can perceive nothing in the statute *thus applied* which amounts to an arbitrary deprivation of the rights of the citizen, and concur with the Supreme court of Tennessee that this act, which had been in force for more than sixty years before the adoption of the Fourteenth Amendment, was not invalidated by it.'

"The Supreme court of the United States had already, as shown in quotation, decided that the act could not be construed to mean that a third verdict must be sustained when there is no evidence to sustain it, and that our decisions construing it were not to the contrary up to the Woodson case, and that the statute must be applied to cases where there is some, though weak evidence, before it came to the point of concurring with this court in holding the act valid; that is to say, it held the act valid because it gave it a different and less obnoxious construction. It plainly showed the act to be void in the opinion, if it had the construction which this court had given it. To meet the difficulty of agreeing in the result on antagonistic opinions as to the construction, it held that the judgment of this court, that there was *no evidence* to support the verdict, did not mean what it said, but merely meant that 'the jury ought not to have found the verdict that they did, and that the judgment of the court below refusing to grant a new trial upon the facts would have been reversed but for existence of the statute which made it error to award it. For,' says that court, 'the statement in the judgment of affirmance of the Supreme court of Tennessee is that the court adjudges that there is *no evidence* to support the verdict of the jury,' and 'if this were taken literally, it would follow that no recovery *could be had.*'" 89, 334. *Railway Co. v. Mahoney, Admr'x.* 1890.

Insurance—Statutes Regulating—Liability on Policies—Valid in Part—Act of 1893, Ch. 107—Cotton in Bales.—BEARD, J., held that "Disseizin of privileges or deprivation of property otherwise than by the law of the land or due process of law, is not made by Act of 1893, ch. 107, sec. 1, making void all stipulations in insurance policies which limit liability to less than the full amount of loss, if this does not exceed the amount of insurance. Excepting insurance upon cotton in bales from the provision in Act of 1893, ch. 107, sec. 1, making void all stipu-

lations limiting liability to less than the full amount of the loss if this does not exceed the amount of insurance, does not make an arbitrary, unreasonable, and unnatural classification in violation of the Constitution." Also reaffirmed the doctrine that "a statute, unconstitutional in a separable and independent part, is not void *in toto*." 95, 248. *Dugger v. Insurance Co.* 1895.

Statutes Relating to Personal Property.

Execution — Judgment Payable in Notes of Certain Banks — Art. 1, Sec. 21—How and When Individual Deprived of Property. — The Act of 1819 ch. 19, sec. 1, which directed that no execution shall issue upon a judgment until two years after its rendition unless the plaintiff shall endorse upon the execution that the sheriff may receive, in satisfaction, the notes of certain banks was thought by counsel to be in conflict with this clause of the Constitution. HAYWOOD, J.: "Property is a thing in being which is capable of becoming the subject of dominion or ownership, and which actually has a master or proprietor, and is actually reduced into possession. Property in possession, by this clause, is secured to the owner, so that it can not be taken from him but by due course of law in a court regularly constituted and proceeding by the standing rules of law; not by Act of Assembly depriving the owner of it for the benefit of some other individual. The State has the eminent domain or *ultimatum dominium* over all the subjects of property in its territory, and may use it on urgent occasions for the public good, when, in the opinion of the sovereign power, it is just and necessary so to use it. In the war of the Revolution the government authorized impressments of all things necessary for promoting the great cause in which it was engaged. This power of the legislature, by sec. 21 of our Bill of Rights, is limited in its exercise, though not taken away; no man's property shall be taken or appropriated to public use, without the consent of his representatives, or without just compensation being made therefor.' The Act of Assembly now under consideration takes away no property either for public or private use, and is, therefore, not affected either by sec. 8 or sec. 21 of the Bill of Rights." 7, 18. [1] *Townsend v. Townsend et al.* 1821.

Unclaimed Money in Clerk's Hands — Escheat Law Constitutional. — MCKINNEY, J.: "We are of opinion that the Act of 1845, the substance of which has been incorporated into the Code, sections[2] 521, 524, is free from any constitutional objection.

"Moneys, in greater or less amounts, are constantly paid into the clerk's offices, which are never called for by the persons to whom they belong, and consequently fall to the clerk. The law in question trans-

[1] See same case, art. 1, sec. 17; art. 1, sec. 20. [2] T. & S., 521; M. & V., 578; Acts 1893, ch. 65.

fers these moneys to the several county treasuries. This law is based upon the familiar principle of the doctrine of escheat, by which the lands of persons dying without heirs, or for which no owner can be found, go to the State; or, with us, to the common school fund. The same principle, we suppose, may be applied to personalty.

"What objection can there be to such a provision? The rights of the persons to whom the moneys were due, should they ever appear to demand them, are carefully protected by the statute. No injury is done to them by the transfer of the fund from the clerk's office to the county treasury. The payment of the money, if ever called for, is at least as amply secured to them. Nor is any injury done to the clerk, of which he can be heard to complain. He has no right or claim to the money; and the authority of the statute is full indemnity to him against all future liabilities, as regards the persons to whom the moneys may belong, in the event they should ever appear or demand payment." **41**, 203. *Deaderick v. County Court of Washington.* 1860.

Sale, After Passage of Act, of Pistols Purchased Before Passage of Act — Privilege License — Police Power of State.—The [1]Act of March 17, 1879, entitled "An Act to prevent the sale of pistols," was before the court to test its validity, under the following facts: Burgoyne is a merchant in the city of Memphis. Before the passage of the act quoted he brought to his business pistols of several kinds. His merchant's license had not expired at the time of importation. Subsequent to the 17th of March, 1879, and after the expiration of the license under which he was operating at the date of the importation of the pistols, but while he was exercising merchants' privileges under a second license, he sold to customers pistols other than army or navy. He was convicted and judgment arrested. The State appealed.

TURNEY, J.: "If the legislature may not today pass a law to prohibit the sale of articles contraband of peace and good morals, because a man six months ago, under a different law, supplied himself with such articles for the purposes of sale and profit, it results that so long as the merchant may have, as a part of his stock, goods purchased before the passage of the new law, he may continue to operate under the old or repealed law, no matter how long the time may be between the introduction of the new law and the completion of the closing out sales of the prohibited articles. Thus the right to sell will continue for an indefinite period of time. The restrictive, or rather prohibitory power exercised by the legislature in this instance is a governmental one, and used for police purposes. Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority, inherent in every sovereignty, *to make all such rules and regulations as*

[1] M. & V., 5542.

are needful to secure and preserve the public order and to protect each individual in the enjoyment of his own rights and privileges, by requiring the observance of rules of order, fairness and good neighborhood by all around him. ' This manifestation of the sovereign authority is usually spoken of as the police power. Cooley on Taxation, 396. The principles of this rule extend to the conference of the power of prohibition when, in the opinion of the legislature, prohibition is necessary to the attainment of its ends. . . . Is the owner of the pistols deprived of the right of property therein? Does the act declare that the owner shall neither sell nor dispose of them, nor use and enjoy them? Does it confiscate them and deprive him of his property without due process of law? We think the proviso to the statute is a full and complete answer to every objection suggested by the several questions. It is: 'Provided, that this act shall not be enforced against any *person now having license* to sell such articles, until the expiration of such present license.' This, in our opinion, preserves the right of property in its use, sale and enjoyment. All rights existing under a license had at the passage of the law are expressly reserved to the merchant. We must presume the time allowed was ample, as the agreed state of facts makes no question upon it." **75**, 173. *State v. Burgoyne.* 1881.

Statutes Pertaining to Real Property.

This Section Intended to Secure to Weak and Unpopular Minorities and Individuals Equal Rights with the Majority — Suits Brought in Name of Indian Reservee to Recover Land — Partial Law.—CATRON, J.: "This was an action of ejectment brought by the heirs of Wally against the defendant, claiming the land in controversy as a reserve, by virtue of the Treaties of 1817 and 1819 with the Cherokees. The material question involved is this: On the trial below, the defendant proved that the suit was prosecuted for the benefit of another, and not the lessors of the plaintiff, who had contracted to convey their interest before the suit was brought. On this point the court charged the jury, 'that if they believed the lessors of the plaintiff had sold their interest in the land in dispute, they must find a verdict for defendant.' The jury accordingly found a verdict for the defendant. The charge of the Circuit court was grounded on the Act of 1827, ch. 39, passed December 6 of that year. This suit was commenced August 27, 1827. The act first provides, 'that interrogatories might be exhibited to the plaintiffs, and if it should appear that the suit was prosecuted in trust for another, it should be dismissed.' This mode was not pursued; or, 'that the defendant on the trial of the cause might prove by witnesses, that the suit was instituted or prosecuted, in whole or in part, upon a contingent interest, or in trust for any other person than the one in whose name such suit was brought; and, if the facts should so appear from such

examination, it should operate as a bar to the recovery of the plaintiff.' The Act of 1827 is a partial law, applying only to suits then brought, or which might thereafter be brought in the name of any Indian reservee, to recover lands under the provisions of the Treaties of 1817 and 1819, between the United States and the Cherokee Nation of Indians. The treaties secured to the reservees the right of citizenship. Of course in 1827 they held the same relation to the body politic, and were entitled to the same measure of constitutional protection, as the citizens of Tennessee.

"Does that part of the Act of 1827, which declares that the suit shall be barred if the defendant prove it was prosecuted in trust for another, violate the Constitution? . . . What is 'the law of the land?' This court, on two occasions, and upon the most mature consideration, has declared the clause 'law of the land' means a general public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community, and those who made the law, by another; whereas a like general law affecting the whole community equally could not have been passed. Vanzant *v.* Waddel. For the most lucid and conclusive exposition of this clause of the Constitution within the knowledge of the writer, he refers to the opinions of Judges Green, Kennedy and Peck, in the cause of the Bank *v.* Cooper's Securities, at Nashville in 1831. 'The Act of 1827 is peculiarly partial. It is limited in its operation to a comparatively small section of the State, and to a very few individuals claiming a very small portion of the section of country referred to.' . . .

"The act was intended to drive from the courts of justice a few odious individuals, who it was supposed had speculated upon the ignorance and necessities of the Indian reservees, and fraudulently obtained their claims for trifling considerations, and were corruptly obtaining evidence to establish rights to reserves, where the Indians in fact never had any, to the prejudice of the purchasers from the State. If the supposed facts did exist, there was good cause for public indignation, but none for a violation of the Constitution by the passage of a law affecting the rights of a few individuals, but by which the great body of the people, or the legislators themselves, were unwilling to be bound. The part of the Constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our government, exercise the legis-

lative power. Any other construction of the Constitution would set up the majority in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws binding on the latter. The part of the Act of 1827 above referred to is unconstitutional and void." 10, 555. *Wally's Heirs v. Kennedy.* 1831.

Value of This Provision in Times of High Political Excitement — Declaring Statutes Unconstitutional — Responsibility of Courts — Legislature Can Not Dispose of Estate of a Citizen — Private Act to Sell Land of Infants to Pay Debts They Did Not Owe, Void.—The Act of 1825, ch. 154, enacted upon the application of the guardians of the complainants, authorized said guardians to sell the tract of land in controversy for the purpose of raising a fund to pay the debts of complainants' ancestor. In pursuance of its provisions they proceeded to sell the land, on May 18, 1826, to David and Thomas Steel, to whom a conveyance was made. The Steels sold to James Perry, who took possession of the premises, and who has since sold to James W. Wheeler. The bill prays that the deed to the Steels may be delivered up to be canceled, that the possession of the land may be delivered to complainants. GREEN, J.: "It is . . . contended that this provision of the Constitution was not intended to apply to a case like the present, but was intended to prevent majorities in times of high political excitement from passing partial laws, whereby to create forfeitures of estates and otherwise to destroy obnoxious individuals. It is true, no doubt, that the primary object of the framers of the Constitution was to protect individuals in cases like those suggested in the argument. But the language used is of general application, and forbids the enactment of a partial law by which the rights of any individual shall be abridged or taken away. Nor is there a single provision in our Constitution more salutary in its character, or that demands in its enforcement the exercise of greater vigilance and energy.

"The only means by which the legislature can be kept within the bounds of the Constitution, in times of high political excitement, is to accustom its members to the restraints it imposes, and to check their assumption of an excess of power promptly whenever the case occurs. If, when the public mind is quiet and public opinion sustains the court in the dispassionate and impartial exercise of its supervisory power, precedents of constitutional violations shall not be permitted to take effect, we may hope that each department of the government, accustomed to move in its legitimate sphere with uniformity and harmony, will not readily run into excess, even in times of excitement and party strife. Public opinion, too, accustomed to yield to the authority of judicial decisions, and to sustain the courts even when they arrest the operation of a legislative act, will acquire a wholesome morality and a

firm tone, by which the courts will feel sustained and encouraged in the discharge of their duty should the time ever come when the sanctuary of justice will be the last hope of the oppressed. Every case, therefore, where the constitutionality of a legislative act is drawn in question, is a grave and important matter, and while on the one hand the courts ought to entertain for the legislature the highest respect, and to decide against their acts only from the clearest convictions of duty; on the other hand, where they are clearly satisfied the Constitution is violated, they have no alternative but to declare that such act of the assembly is not law. . . . Neither the infancy of the complainants nor the fact that their land descended to them from their father, whose debts were not all paid, gave the legislature any more power to direct a disposition of their estate in a manner not authorized by the general laws of the land than exists in that body to dispose of the estate of any other citizen in the same way. That the legislature has power, upon the suggestion that a man owes debts, to pass an act directing the sale of his land for their payment, no one would argue. And yet the exercise of such power would be less objectionable than the act in question. In this case the parties whose land was sold were not indebted. It was not certain that the debts due from their ancestor would ever become a charge on their lands. By this sale, then, their real estate is taken away and applied to the payment of debts they did not owe—not by the judgment of their peers, not by the law of the land, but by a special, partial act of the legislature, applicable to their case alone." **18**, 72. [1]*Jones' Heirs v. Perry et al.* 1836.

Grantee Neglecting to Have His Land Processioned Under the Act of 1819 Not Bound by Erroneous Procession Made by Surveyor; Nor is He Estopped from Claiming to His True Line.—TURLEY, J.: "Upon the trial in the Circuit court the judge charged the jury that, if a grantee of lands in the western district failed to have his land processioned within the time prescribed by the Act of 1819, and the surveyor of the district caused the same to be done, and spread upon the general plan of his district, it would be binding and conclusive upon the grantee, and that he would be estopped from denying or disputing the lines thus established, although they might vary from the original and cover other and different lands than were covered by the original location. There was a judgment for the lessor of the plaintiff, to reverse which this writ of error is prosecuted. The question for consideration is whether the defendant is bound by the procession, and estopped thereby from claiming the land covered by his entry and grant according to their calls.

"That the land in dispute is covered by the entry and grant of Joseph Greer can admit of no controversy, and of consequence he and

[1] See same case, art. 2, sec. 2.

those claiming under him have had the legal title thereto. The question, then, is at once presented: If it be lost, how has it been done? It is not pretended it has been done by voluntary conveyance. . . . It has not been done by the judgment of his peers, and it only remains to inquire whether it was by the law of the land. It is contended that the Act of 1819 is the law of the land, and that by a fair construction of it the defendant has lost his right to the land that he originally owned, and is compelled to take in lieu thereof other and different lands, as specified by the erroneous procession of the surveyor under the powers vested in him by the act.

"Whether a statute is the law of the land . . . always depends upon two propositions: 1st. That the legislature had the constitutional power to pass it. 2d. That it is a general and public law, equally binding upon every member of the community. If we were to give the construction asked for by the lessor of the plaintiff to the Act of 1819, we should find it exceedingly difficult, when tested by the above propositions, to declare it the law of the land. But we are relieved of the necessity of determining this delicate question, because we do not believe the construction asked for to be correct. Suppose the legislature to have the power to pass a statute, such as it is argued the Act of 1819 is, by which a freeman is to be deprived of his freehold, yet this result can not be produced by equitable construction, but must be by positive enactment. If the power exist, it is a high prerogative, and we will not intend that the legislature design to exercise it unless they say so in express words. No argument from policy, or inconvenience, or the harmony of system can be permitted to have any weight in the decision of such a question. Has the legislature provided, then, by the Act of 1819, expressly that a grantee who neglects to have his land processioned as therein directed shall be bound by an erroneous procession made by the surveyor, and estopped thereby from claiming to his true line? Assuredly not. Indeed, if construction could be resorted to for the purpose of establishing this principle, it would be found exceedingly difficult, if not impossible, so to construe the statute. . . . We then think the charge of the Circuit court was erroneous, because the statute does not expressly undertake to disseize the defendant of his freehold, and that, if such a thing could be done by construction, such is not the legitimate construction of the statute." 21, 296. *Sheppard v. Johnson.* 1841.

The Constitution—Measure and Limits of its Power in This State—Not the Beginning of a Community—Not the Origin of Private Rights—Conditions Existing at Time of Formation—Right to Acquire Property—Taking Private Property for Private Use—Statutes, Public and Private—Descent and Distribution—Lunatic—Act of 1885, Ch. 88, Unconstitutional.—ED. BAXTER, Sp. J., held: "In Tennessee it is a settled

doctrine of constitutional law that 'the legislative power of the general assembly of this State extends to every subject except in so far as it is prohibited either by the delegated powers of the federal government or by the restrictions of our own Constitution. He who would show the unconstitutionality of an act of the legislature must be able to put his finger upon the provision of the Constitution violated.' And therefore the courts can not annul a statute which is free from other exception, upon any assumption that it is opposed to the 'eternal principles of justice,' or to 'natural equity,' or to the 'inherent rights of freemen,' or to some vague and general spirit that is supposed to pervade the Constitution, but not expressed therein. But, 'in considering State Constitutions, we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. A Constitution is not the beginning of a community nor the origin of private rights; it is not the foundation of law nor the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made; it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought.'

"When the Constitution of this State was formed, 'the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance to our descendants in regular order and succession' was 'enjoyed to the fullness and perfection of absolute right,' and one of the objects of the Constitution was to protect and preserve this right. Act of 1885, ch. 88, changing our laws of descent and distribution with reference to estates of lunatics, is unconstitutional and void. That act provides that the personal estate of which a 'lunatic or *non compos mentis*' dies intestate, if derived from an intestate husband or wife, shall go, not to the next of kin of such 'lunatic or *non compos mentis*,' as in case of other intestates, but to the next of kin of the person from whom the estate was derived. This act . . . does not deprive an intestate lunatic's next of kin of property within the meaning of this constitutional prohibition . . . even when the act is applied to a lunatic who, before its passage, had acquired personal estate of an intestate husband or wife, and continued to be a lunatic and died intestate after the act had been passed. The expectancy of next of kin is not *property*. . . . But this act, . . . if valid, would deprive the 'lunatic or *non compos mentis*' himself of that which is recognized as *property* within the constitutional prohibition aforesaid, to wit: The right to

transmit his property by inheritance to his *own* descendants or next of kin.

"A statute which deprives any one of property is not valid unless it is the 'law of the land.' This act . . . is not the 'law of the land,' because (1) the classification upon which it is based is 'unnatural, arbitrary, and capricious;' and (2) it operates to take private property for private use, contrary to an implied prohibition of the Constitution. 'Law of the land,' correctly defined, means a law 'which embraces all persons who are or may come into like situation and circumstances.' It may be made to extend to all citizens, or be confined, under proper limitations, to particular classes. If the class be a proper one, it matters not how few the persons are who may be included in it. Whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary. If the classification is made under art. 11, sec. 8 . . . for the purpose of conferring upon a class the benefit of some special right, privilege, immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. If the classification is made under this section . . . for the purpose of subjecting a class to the burden of some special disability, duty or obligation, there must be some good and valid reason why that particular class should alone be subject to the burden. A law which violates any provision of the Constitution, whether the provision be express or implied, can not be the 'law of the land,' because an unconstitutional law is, in fact, no law at all. 'Though the Constitution does not expressly prohibit the taking of private property for private use, yet it has been held to do so by implication,' and therefore a statute can not be the 'law of the land' which takes the private property of one person to give it to another for the latter's private use." 89, 499. *The Stratton Claimants v. The Morris Claimants.* 1891.

Constitutionality of a Statute—Rules of Construction—Mechanics' Lien Law, [1]Acts 1889, Ch. 103, Secs. 1, 2, and 3—Not Class Legislation.—CALDWELL, J., held: "Courts indulge every reasonable intendment favorable to the constitutionality of a statute passed with the required formalities. If susceptible of two constructions, one that renders the statute constitutional will be preferred to another, though more natural, that renders it unconstitutional. Statutes upon trial for unconstitutionality, are entitled to benefit of every reasonable doubt. . . . There is no valid objection, upon constitutional grounds, to sec. 1, ch. 103, Acts of 1889, which provides for lien upon realty in favor of 'every journeyman or other person' who furnishes labor or

[1] Shannon's Sup. to M. & V. Code, p. 250.

material to an original contractor, to be used in putting improvements upon such realty under contract between him and the owner. The owner contracts with reference to the law which gives the lien for work and labor furnished to his contractor by journeymen and others. The provision of sec. 1 of said act, allowing the 'laborer, mechanic or workman' thirty days 'after the building is completed, or the contract of such laborer, mechanic, or workman shall expire, or he be discharged,' in which to give the owner written notice that a lien is claimed for such labor and material as have been furnished the contractor, does not render the act unconstitutional. The owner may, by contract or indemnity bond, protect himself against double payment for such labor and material.

"There is no valid objection upon constitutional grounds, to sec. 2, which, properly construed, authorizes every mechanic, laborer, and furnisher to take and remove, under the direction of a court, after giving ten days' notice, to the owner, of his purpose to do so, all 'such property or the parts of the same on which his labor was performed, or materials, machinery, or other property was used,' at the request of a contractor for the owner's benefit, when such improvements have been made upon the lands of a married woman, or other persons under disability, or upon trust estates, or upon lands held by other superior title, or subject to prior liens, and the mechanic, laborer, or furnisher was ignorant of the state of the title and the true owner refuses to recognize the lien or claim for the materials furnished or labor performed.

"Sec. 3, permitting the owner who has been compelled to pay his contractor's employees in discharge of their lien on the property, to take judgment over against the contractor upon his indemnity bond upon mere motion, is valid and constitutional. Although notice to the contractor of this motion is not expressly provided for in the act, it is required by necessary implication. This provision of sec. 3 of said act does not constitute vicious class legislation. 90, 466. [1]*Cole Manufacturing Co. v. Falls.* 1891.

Statutes Governing Taxation.

Vital Principle of All Regular Governments Is a Revenue to Support its Existence—May be Raised by Summary Method of Taxation.—Overton and White, J. J.: "A summary mode of levying taxes on lands had been in existence previous to, and at the time of, the formation of the Constitution. It was manifestly the intention of the convention that summary proceedings, such as the people had been accustomed to, should not be inhibited. The expression used in the Constitution, 'law of the land,' communicates the idea of such proceeding of the courts as

[1] See same case, art. 2, sec. 17.

had been customary, or should thereafter be provided conformable to the spirit of those habits, and of the common law. See 2 Hay., 142, 320, 322. The Constitution has no effect on these proceedings. The first and vital principle of all regular governments is a revenue to support its operation and existence. Without it the government must soon perish. All governments to raise this revenue, lay taxes on property, and their proceedings necessarily must be summary and *in rem* as to that. Acts made for the attainment of these essential objects of the State must receive such construction as will effectuate the intention of the legislature, where it is not opposed by the provisions of the Constitution, or restricted in the effect by legal principles applicable to the proceedings necessary to carry into effect that intention." 6, 255. *McCarrol's Lessee v. Weeks.* 1814.

Old Definition of "Law of the Land" Adhered To—Act Directing Refunding of Taxes to Certain Individuals Violates Art. 11, Sec. 8 and This Section.—NICHOLSON, J.: "On the 8th of June, 1865, the legislature passed an act releasing the people of the State from the payment of the State taxes for the years 1862, 1863 and 1864; *provided*, that nothing in the act was to be construed to refund to the people any taxes already collected for those years. This was a general law applicable to all the counties, and was therefore obnoxious to no constitutional objection. By this law the State taxes already collected were not to be refunded to those who paid them, but continued to constitute part of the revenue of the State, subject to be collected from the several collectors in pursuance of the existing provisions of the laws on this subject.

"But by the Act of February 19, 1868, the county of Roane is singled out, and the amount of the State revenue in the hands of the representatives for the collector of that county is directed to be diverted from the State into the county treasury, and then to be refunded to those from whom it was collected. . . . The general law appropriates the taxes collected in 1864 in the various counties of the State to the general purposes of the government, as State revenue. This act suspends this general law as to Roane county; and for the benefit of the individuals who paid these taxes in that county, directs them to be refunded to them. In other words, the act undertakes to donate to certain individuals in Roane county, out of the treasury of the State, the several amounts paid by them into the treasury in 1864, but confers no such benefit on the other individuals in other counties of the State who had made like payments into the treasury. The statement of the proposition exposes its unconstitutionality without further remark or argument.

"But, in the next place, it is insisted that the other provisions of the act by which it is directed that the chairman of the County court shall call the administrator to a settlement, and on his failure, shall move for judgment in the name of the State for the use of the county, are alike unconstitutional, because in violation not only of the eighth section, art. 11, . . . but of sec. 8 of art. 1. . . . It is settled by a long train of decisions in our State, that the 'law of the land' is 'a general and public law, equally binding upon every member of the community.' It is too clear to require argument that the Act of February 19, 1868, secs. 30, 31, 32, 33 and 34, can not be regarded as the law of the land." **53**, 188. *State v. Burnett, adm'r, etc.* 1871.

Distress Warrants Due Process of Law.—This suit involved the validity of the Act of March 23, 1875, entitled "An Act to extend the time in which to collect taxes assessed for the year 1874 and for the relief of the people." NICHOLSON, J., quotes from the opinion of Justice Curtis, 18 How., 282, and says: "The question, involved in the case in which these remarks were made, was, whether a distress warrant issued by the solicitor of the treasury was valid 'process.' The warrant was authorized by an Act of Congress, passed in 1820. The objections to the validity of the warrant raised the question, whether, under the United States Constitution, a collector of customs, from whom a balance of account had been found to be due by accounting officers of the treasury, can be deprived of his liberty or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by 'due process of law,' within the meaning of those terms in the Constitution; and if so, whether the warrant in question was such due process of law? In discussing these questions, Justice Curtis refers to precedents furnished by the History of England, as to the mode of collecting claims due to the government, and says: "We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of revenue.'

"He concludes that the methods of ascertaining and enforcing debts, found to be due to the government, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, 'the law of the land' authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, then in question.

"He adds: 'It is certain that this diversity in the law of the land, between public defaulters and ordinary debtors, was understood in this country, and entered into the legislation of the colonies and provinces,

and more especially of the States, after the Declaration of Independence, and before the formation of the Constitution of the United States.'

"Tested by the common and statute law of England, prior to the immigration of our ancestors, and by many of the States at the time of the adoption of the Fifth Amendment to the United States Constitution, the proceedings under the Act of Congress of 1820, were held to be 'due process of law.' For though 'due process of law' generally implies and includes *actor, veus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true. 'There may be, and as we have seen,' says Justice Curtis, 'there are cases, under the law of England after Magna Charta, as it was brought to this country and acted on here, in which process, in its nature final, issues against the body and goods of certain public debtors without any such trial.' . . . Applying the doctrines of the court, in the case from which we have been quoting, as to the true meaning of the words 'law of the land' used in the Constitution, we must regard it as authority for holding, that our statutes which authorize the ascertainment of the amount of taxes due from each citizen, and the issuance of a distress warrant to enforce the same, against such as fail or refuse to pay the taxes assessed, are constitutional and valid." 55, 559. [1]*Myers v. Park.* 1875.

Statutes Relating to Remedies.

Remedies — Redress — Existing Liabilities — Partial Laws — Law of the Land — Definition of. — CATRON, J.: "The question presented by the record is, has the legislature power to direct the mode by which members of a particular corporate body may be notified to appear before the ordinary tribunals of the country, to be proceeded against according to the public and general laws of the land? That a partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general and public laws of the land, is unconstitutional and void, we do not doubt. Our entire approbation is accorded to the decisions cited in the causes of Dartmouth College *v.* Woodward, 4 Wheat. Rep., 518, and Holden *v.* James, 11 Mass., 396. The clause, 'law of the land,' means a general and public law, equally binding upon every member of the community. Our colonial history will best teach its meaning. Our ancestors were taught it by being transported across the Atlantic for trial, by the Boston port bill, and other British legislation. A careful examination of Marshall's History of the Colonies, particularly the thirteenth and fourteenth chapters, and of Smollett's and Bissett's History of England, especially vol. 1, ch. 12, of the latter, will greatly tend, it is apprehended, to change the opinion of the counsel of the plaintiff, who contended in argument,

[1] See same case, art. 2, sec. 28.

that this term had no definite meaning; at least not the one here ascribed to it; and that it answered no useful purpose in the Constitution. Notwithstanding the provision, is it to be supposed the legislature, equally with the governments of France, Russia or Turkey, is sovereign in this respect, even retaining the powers of individual proscription extending to banishment, as well as power to legislate partially in reference to particular individuals, affecting their rights by partial and extraordinary remedies?

"The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'land,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another. The idea of a people through their representatives making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our Constitution. See 2 Inst., 46, and the Declaration of American Independence.

"A general and public law, prescribing remedies and modes of redress to enforce existing liabilities, can certainly be constitutionally passed. 4 Munf. Rep., 109; 4 Wheat. Rep., 200, 207.

"Can the same be done by a partial or private law? This can as certainly not be done, if the measure of justice to be administered is not according to the public laws of the land. Yet, nothing can be seen in the present record which did, or by possibility could, impair the right of the defendant, or deprive him of the power to defend the action otherwise than as such rights were governed by the general laws of the land previous to the passage of the Act of 1821. Nor can it be seen that any constitutional prohibition stood in the way of the legislature, to prescribe the time when the notice should be given and examination taken. The contract was enforced, in point of fact, under the Act of 1811, and the mere time of the defendant's appearance conformably to the notice, did not deprive him of the full benefit of the general laws of

the country in resisting the claim." WHYTE, J., concurred. Judgment affirmed. 10, 270. [1]*Vanzant v. Waddel.* 1829.

Corporation Can Not Complain at Remedies Provided By Itself.—GREEN, J.: "Where a charter of a corporation provides a remedy in favor of the owners of land taken by the corporation, the company accepting the charter can not complain that it is a partial law and not the law of the land." 27, 481. *Nolensville and Nashville Turnpike Co. v. Quinby.* 1847.

Municipal Corporations—Ordinances.

Taxing Districts—Statutory Exemption From Liability for Defects in Streets—Partial Laws—When Violative of This Section and When Violative of Art. 11, Sec. 8.—By the Act of 1881, ch. 96, the original Taxing District Act, section 19, was amended so as to read: "That the counties in which taxing districts are situated, and the taxing districts themselves, shall not be liable for damages or injuries to persons or property by reason of defects in the streets or alleys, or other property under the control and within said taxing districts," etc. The plaintiff contended that this act was in violation of art. 11, sec. 8, of the Constitution. COOPER, J.: "The cases cited by the learned counsel, in his argument in support of this contention, are cases of partial laws, which were held to be violate of art. 11, sec. 8, of the Constitution. And it is very true that a provision of a municipal charter, which undertakes to make a law for, or in regard to, that municipality different from the general law, or to withdraw from the operation of a general law, applicable to all municipal corporations, a particular corporation, or class of such corporations, would be obnoxious to the clause of the Constitution last cited, because not the law of the land. Mayor of Alexandria *v.* Dearmon, Hatcher *v.* State, 12 Lea, 368. But the particular franchises or rights granted to municipal corporations have never been held to fall within the prohibition of art. 11, sec. 8. For such franchises are extended to any member of the community who may become a member of the corporation. And, besides, such a construction of that provision of the Constitution would deprive the legislature of the power to make exceptional provisions for particular municipalities, or classes of municipalities. There is no statute or other law making all municipal corporations liable for neglect of its streets, but only a consensus of decision that such corporations possessing certain powers should be liable. The simple question there is, whether the legislature can so limit the rights and privileges of an incorporated town or city in the matter of local taxation as to leave it in the category of a county, and thereby make it an agency of the State in the matter of its public

[1] See same case, art. 1, sec. 6, p. 15; art. 1, sec. 20. Meigs' Dig., vol. 2, p. 929.

streets, and not in that respect a complete municipal corporation, in the ordinary meaning of those words. But we have already held that the legislature might, constitutionally, reserve to itself the power of levying the taxes of this corporation. And it is very clear that the corporation is so restricted in the use of the proceeds of the special taxes, assessed by the legislature, and so totally deprived of the power of taxation to meet any liability for injuries, as to show a plain legislative intent that the corporation shall not be liable." **84**, 531. [1]*Williams v. Taxing District.* 1886.

Old Definition of "Law of the Land" Repeated—Penalty Against Sheriff of Only One County—Special Act—Repeal of Statute—When it Will Not Be Implied.—CARUTHERS, J.: "This action was brought to recover a penalty of fifty dollars from the defendant for failure to hold an election for officers of the corporation of Alexandria, on the second Monday of February, 1852, as required by the charter of said town. A recovery was had before the justice of the peace, but on appeal to the Circuit court the plaintiff failed, upon the ground that the judge charged that the provision in the charter by which the penalty was created had been repealed by the Act of 1849–50, ch. 17, sec. 16. The Act of 1847–48, ch. 111, sec. 10, makes it the duty of the sheriff of DeKalb county to hold the election for town officers, aldermen, etc., on the second Monday of February of each and every year, and 'for failure to hold said election, or causing the same to be done, said sheriff shall forfeit and pay the sum of fifty dollars, to be recovered by action of debt, before any justice of the peace for DeKalb county, in the name of the mayor and aldermen, for the use of said corporation of Alexandria.' In 1849–50 a general act was passed, providing for holding the election for officers of town corporations at any other times than those prescribed in the charters, if omitted, for any cause, to be held on the charter days, and giving validity to such elections.

"The argument made is that the reason and cause of the penalty in the Act of 1848 was that, if the officers were not elected on the day designated by the charter, no subsequent election would be valid, and that as this difficulty was removed by the Act of 1850, it was an implied repeal of the penalty. And so the law was charged by the circuit judge. We can not concur in this reasoning or conclusion. The two acts can well stand together; they are perfectly consistent with each other. It is no sufficient argument in favor of an implied repeal of an act of the legislature that some of the evils provided against are subsequently removed. The penalty is for a failure of duty in a public officer. Some of the consequences of that neglect to the injury of the public are removed by a subsequent act, but the duty still remains, as well as the

[1] See same case, art. 1, sec. 17.

prescribed penalty for neglect. Cooke, 338. But the Act of 1835, ch. 49 (C. & N., 277), is of the same purport as the Act of 1850. But upon another ground, assumed in argument, we think the judgment below must be sustained. The clause in the Act of 1847–48, upon which this action is founded, is not 'the law of the land,' and therefore can not be enforced without an infraction of the constitutional rights of the defendant. The principles settled in the case of Budd *v.* The State, 3 Humph., 490, are, as we think, conclusive in their application to this case. . . . The meaning of the phrase, 'law of the land,' is so fully expounded in the case above cited, and the previous cases of Vanzant *v.* Waddel, and Walley's Heirs *v.* Kennedy, and the Bank of the State *v.* Cooper, and the case of Officer *v.* Young, that it would be unnecessary now to dwell upon that subject, as no additional light can be shed upon it. Nothing is left to be done but to apply the principles so well settled to new cases as they may arise before us.

"The 'law of the land,' then, in the sense of the Constitution and in reference to the acts of the legislature, is an act which extends to and embraces all persons who are, or may come into, the like situation and circumstances. There are more than seventy sheriffs in the State. This Act of Assembly prescribes a penalty against the sheriff of DeKalb, or 'deprives him of his property' for not performing a certain duty. To make this legislation the 'law of the land' it would have to be applied to all other sheriffs in the State of whom the like duties are required. The act, then, does not apply to and affect all persons or officers who are, or may be, in the same situation and circumstances, and is therefore partial and limited in its operation, and consequently not the 'law of the land' in the sense of our Constitution. It is no answer to this objection that the penalty complained of is prescribed in a charter of incorporation, and is for that reason saved from a constitutional inhibition." 34, 120. *Mayor etc. of Alexandria v. Dearmon.* 1854.

Power to Create Municipal Corporations Would Exist Without Express Authority of the Constitution — Theory Upon Which They are Established — Powers to Enforce Penalties. — SMITH, J., held: "City ordinances prescribing pecuniary penalties for infraction of the same, and the court wherein, and the mode of procedure whereby, their ordinances are enforced, are not obnoxious to the constitutional rule known in Tennessee as the 'law of the land,' or to any other constitutional provision. The power of the legislature to enact municipal corporations, is authorized by the Constitution; and without such express authority, no doubt could be raised or entertained, of the existence of the power. Municipal corporations, as a means of local government, existed before the Constitution was formed, and have been established during the whole existence of the State, and were governmental institutions derived from the country from which we took our origin.

"Laws and regulations adequate to protect the safety, health, comfort and good neighborhood of people in rural districts, are utterly insufficient for such purpose in the cities. Numberless acts and negligences of men in the country, which are harmful to nobody, are greatly dangerous and injurious to the inhabitants of cities. Hence the necessity and sanction of particular and minute regulations prescribed by municipal governments, touching and penetrating the life and conduct of persons in cities, which are unnecessary, and would be intolerable, to enact and enforce upon the inhabitants of the country. Ordinances and by-laws of this kind, are enacted for the government of men in cities, and have been so done in all the States of the Union, from the first colonization of the country, and have been so done in England from the earliest period of its known history. These ordinances, though peculiar to the municipality which enacts and enforces them, and though different from the general laws of the State, applicable to all people of the State, have never, for such reasons, been supposed to be invalid. They have not been deemed obnoxious to the objection of being partial laws, or not laws of the land.

"On the contrary, they are regarded with particular favor. The fundamental and distinctive principle of English and American government is, to *decentralize* administrative and legislative power. To the general or central government, is bestowed the enactment and execution of laws which concern the people generally of the whole State, and which are properly and beneficially applicable to the whole people. To the local and small subdivisions and districts and communities of the people, are confided the exercise of the powers of legislation and administration, suitable to the peculiar needs and purposes of those small localities. Government organized upon this principle, is supposed to be more consonant with the freedom of the people, and better adapted to promote the safety and prosperity of the people, than where the legislation and administration are remote, and concentrated in the hands of the central authorities. However this may be, local government and local regulations, and especially municipal incorporations and powers, are special and established and legitimate agencies, and exercise of governmental power in the State of Tennessee." **46**, 382. [1]*Trigally v. Mayor etc. of Memphis.* 1869.

Municipal Corporation May, By Ordinance, Assess Tax to Maintain School System, and Take Property in Way of This Tax — Consent of Representatives — Act of 1885, Ch. 37. — COOPER, J.: "Something is said, both in the bill and in the argument in support thereof, about the Act of 1885 violating the Constitution, art. 1, sec. 8, . . . and sec. 21 of the same article, that no man's property shall be taken and applied

[1] See same case. See index for section and page.

to public use, 'without the consent of his representatives,' or just compensation. But if the establishment and support of a system of public schools is a corporation purpose, and the Act of 1885 was constitutionally enacted by the legislature, and the ordinance based thereon was properly passed by the municipal authorities, then the property of the complainants taken in the way of taxes to support the system would be taken by the law of the land, and with the consent of their representatives, first in the legislature and again in the city council." 83, 645. [1]*Ballentine v. Mayor etc. of Pulaski.* 1885.

Extending Boundaries — Special Laws Not Deprivation of Liberty or Property. — The act under consideration was that of 1890 (ex. sess.) ch. 33. CALDWELL, J., held: "A special law extending territorial limits of a municipal corporation does not operate to deprive the owners of the included property either of liberty or property, and does not therefore violate," art. 1, sec. 21, nor this section, nor the United States Constitution, Fifth Amendment. 89, 487. [2]*Williams v. Mayor etc. of Nashville.* 1891.

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[1] See same case, art. 2, sec. 2; art. 2, sec. 17; art. 2, sec. 28; art. 2, sec. 29; art. 11, sec. 8; art. 11, sec. 12.

[2] See same case, art. 2, sec. 2; art. 2, sec. 19; art. 11, sec. 8.

CRIMINAL PROSECUTIONS—RIGHTS OF THE ACCUSED.

To Be Heard by Himself and Counsel.

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ART. 1, SEC. 9. That in all criminal prosecutions the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.[1]—[Same as Const. 1796, art. 11, sec. 9. Same as Const. 1834, art. 1, sec. 9, except that the words "or district" appear after the word "county" in that instrument.]

[1] For indirect or unimportant references to this section see **16**, 535; **20**, 291; **22**, 344; **31**, 65; **33**, 217; **37**, 361; **40**, 130; **50**, 276, 336, 407; **65**, 507; **67**, 362; **79**, 708, 712; **81**, 472.

To Be Heard By Himself and Counsel.

Assistant Attorneys for State — Number — Discretion of Court. — TURLEY, J.: "The appearance of more than one attorney on each side of a case is a matter within the discretion of the court. Every man has a right to be heard by attorney, but not by more than one, unless by permission, and a refusal is no cause of error, for which a judgment can be reversed.

"In the case of Gillespie *v.* The State, 3 Yerg., 325, it is said that the State may employ a licensed attorney of the court to assist in the prosecution, but that if it be required, he must produce his authority. We do not concur in the opinion announced in the latter part of this sentence. The attorney general represents the State; he institutes the proceeding, and is responsible for the manner in which it is conducted. He must be heard. The court has no power to refuse him. He must have been legally appointed, and the court have a right to the evidence of his appointment. But as has been observed, if a licensed attorney appear as an assistant, he may be heard or not, at the discretion of the court, with or without authority, if the attorney general consent." 22, 241. *Chambers v. The State.* 1842.

Not a Common Law Right — Reasons Why — Reproach to the Criminal Jurisprudence of England — Remedied by State Constitutions — Reasons Why — Defendant Himself May Address the Jury. — SNEED, J.: "The right of a prisoner to be heard by himself and his counsel is only guaranteed by the State Constitution. It will be observed that the Constitution of the United States gives him the right to have the assistance of counsel in his defense, while the Constitutions of the other States of the Union give him the right to be heard by himself or his counsel. It was not among the boasted liberties of the English subject, vouchsafed by Magna Charta, that a prisoner could either be heard in his own defense by himself or his counsel. The great guaranty, that 'no freeman shall be taken or imprisoned, or disseized from his freehold or liberties or immunities, nor outlawed, nor exiled, nor in any manner destroyed; nor will we come upon him or send against him, except by legal judgment of his peers or the law of the land; we will sell or deny justice to none, nor put off right or justice;' though it secured to the Englishman the right of trial by jury, and is the chief cornerstone of the solid fabric of British freedom which exists at this day, and the foundation of our own fervid liberty, was yet wanting in some humane provision by which the unfortunate citizen accused of felony or treason, might have an opportunity of showing his innocence otherwise than by the failure of the king to demonstrate his guilt. It was a strange and notable inconsistency in English criminal jurisprudence that would shield a prisoner as he sat isolated in the dock with the presumption of innocence, and would yet forbid him for so many centuries — except as a

matter of grace—to utter a word by counsel in his own defense, or to have the assistance of counsel in marshaling his proof to make good the presumption that mocked him with the illusion that English justice was tempered with mercy. It was reserved to the vigorous Anglo-Saxon of another hemisphere to assert and maintain the invaluable right thus ignored by the Barons at Runnymede, that the citizen accused of crime should have his own advocate and counsellor to vindicate his innocence, as well in matters of fact as matters of law, and to see to it that he should not be taken, or imprisoned, or disseized of his liberties, or outlawed, or exiled, or in any manner destroyed, except by the judgment of his peers or the law of the land. It was within the last half century that the Act of 6 and 7, W. 4, ch. 114, was enacted by the British Parliament, entitled 'An Act for enabling persons indicted of felony to make their defense by counsel or attorney.' The first section provides that, 'all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defense thereto, by counsel learned in the law, or by attorneys, in courts where attorneys practice as counsel.' By the second section, it is further declared and enacted that, 'in all cases of summary convictions, persons accused shall be admitted to make their full answer and defense, and to have all witnesses examined and cross-examined, by counsel or attorney.' 2 Lewin's Crown Cas., 262.

"'At common law,' said Sir William Blackstone, 'it is a settled rule that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule,' he says, 'which, however it may be palliated under cover of that noble declaration of the law, that the judge shall be counsel for the prisoner, seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law.' 2 Bl. Com., 285.

"But Sir Edward Coke gave a reason for the refusal of counsel: 'Because the evidence to convict a prisoner should be so manifest, as it could not be contradicted.' 3 Inst., 137. Which Lord Nottingham declared, 'was the only good reason that could be given for it.' 3 St. Tr., 726. While this rule of the English common law that refused the assistance of counsel in matters of fact to a prisoner indicted of treason or felony, was abrogated by statute, as to treason, in the reign of William III, yet, though greatly modified in practice, it continued to be the rule in felonies until the statute of W. 4, ch. 114, already cited. 1 Chitty Cr. L., 410. It was in view of this state of the common law in England upon this question, which was not only a reproach to the criminal jurisprudence of that country, but was in derogation of the principles of Magna Charta itself, and opposed to all the traditions of English liberty, that the invaluable right of a prisoner to be heard by counsel

was incorporated in the fundamental law of this country; and his right to be heard by himself, and his counsel, was engrafted upon the organic law of this State. And the question now recurs, what is the meaning of those words in the Constitution of Tennessee, that the prisoner shall have the right to be heard by himself and his counsel?

"Do they mean, as it is intimated at the bar, that the court below interpreted them in this case, that the prisoner can only be heard as an advocate in his own behalf in the presentation of the law and the facts of his case to the jury; or do they mean that he can make such an explanation of the circumstances which have been proven against him as he may see proper, in order to elucidate their effect, and to solve them into consistency with the hypothesis of innocence? They certainly do not mean that he may become a sworn witness in his own behalf; for the moment he becomes a witness in the cause, he becomes, under the rules of law, subject to cross-examination, and all the usual expedients for testing the verity of his statements; and the very section which gives him the right to be heard by himself or his counsel, forbids that he be compelled to testify against himself. . . . While it is true that, as a general rule, legislative construction of a statute is not of much weight, yet, under all the circumstances connected with the introduction of the statutes upon this subject into the [1] Code, we are of opinion that these statutes have correctly interpreted the right of the prisoner in this respect, as indicated in the directions of the magistrate to the prisoner, as already cited, or so much thereof as admits an explanation of the facts in testimony against him, and that such was the legislative construction of the constitutional provision. . . . We are of opinion that the prisoner in all criminal prosecutions, after the testimony has been heard for and against him, has a right to be heard in an argument in his own behalf and as his own advocate, or in an explanation of the circumstances which have been testified against him; that it is error to deny him this right; that in such case he is not to be sworn or cross-examined as a witness; but that a jury may consider a clear, consistent refutation of guilt to be deduced from an argument which explains, to their satisfaction, the circumstances of suspicion by which the prisoner was before complicated; or they may pay no attention to it whatever. It is not testimony, in its legal sense, but the logic of facts, which, operating upon a mind in quest of the truth, induces an honest conviction that the cloud of guilt which had been generated by the evidence in the cause has been dissipated and removed by the explanation of the prisoner. If he wishes to submit an argument upon the case, he has a right to do so; or, if he would simply explain the facts already in testimony, then he may do so. In other words, the Constitution guarantees to every prisoner the right to explain the case

[1] Code, 1858, 4992; T. & S., 4992; M. & V., 5317.

made against him in his own way. He may waive the right if he chooses, but no court can deprive him of it. If he demands it, the court should at once instruct him that he may make an argument or an explanation of the circumstances proved against him, but that he can state no facts not already shown to the jury." Judges FREEMAN and NELSON dissented. 50, 232. *Wilson v. The State.* 1871.

Heard by Counsel—What This Means.—FREEMAN, J.: "A party is entitled, by our Bill of Rights, when accused, to be heard by counsel. This means more than a simple argument before a jury. It guarantees that in the preparation of his defense he is entitled to the advice and assistance of counsel that his defense may be properly shaped, so that his innocence may be made to appear, if the facts shall so warrant. It would be a cruel mockery to follow the letter, and give counsel for mere argument, when, for want of that counsel's assistance, there may be no case to argue, and the argument be a useless ceremonial." 76, 554. *State v. Poe.* 1881.

Change of Venue in Absence of Prisoner.—Hopkins was indicted in Robertson county for murder, and subsequently while under bond for his appearance, he surrendered to the sheriff of Davidson county. While in jail at Nashville he petitioned the judge of the Circuit court of Robertson county for a change of venue, presenting affidavits containing strong reasons why the venue should be changed, also that the court should act on the petition in the absence of the accused. The court changed the venue and the accused elected Davidson county. The Criminal court of Davidson county, on motion of the attorney general, decided it had no jurisdiction, and struck the cause from its docket. The defendants appealed. TURNEY, J.: "The question is, did the Circuit court of Robertson have jurisdiction, in the absence of Hopkins, to order a change of venue? . . . This ordinance was intended to soften the rigor of common law which gave to persons accused of crime the right to appear for themselves, but deprived them of the right to be heard through and represented by counsel learned in the law. In the practice under our constitutional rule, it is very seldom the accused exercises the right of being heard by himself. He leaves to his counsel the entire management and control of his defense, still, if he were to demand it, the courts would be obliged to allow him to assist in the conduct and argument of his case. If the language 'shall have the right' means that the right must be exercised, that it is a mandate and not merely the recognition of a privilege, few convictions up to the present period in the history of the State are maintainable. The right to be heard by himself is never voluntarily awarded, but is always, when desired, asked for by the prisoner, and when not asked for, is waived. It is too well established in Tennessee, that the accused has

the right to be present at every step taken in his case in courts of original jurisdiction, to be discussed here, yet that right in all preliminary steps is personal to the accused and may be waived. That he has waived the right should clearly, conclusively and satisfactorily appear, before the prisoner is bound by it. . . . It can make no difference that the defendant was in the jail of another county; he was, nevertheless, subject to the order of the court and within its jurisdiction. The judgment is reversed and the cause remanded to the Criminal court of Davidson county for trial."[1] 78, 205. *Hopkins et al v. The State.* 1882.

Putting Defendant Under Rule When Co-Defendant Testifies, Erroneous.—LURTON, J., held: "One of several defendants jointly upon trial for crime can not be put under rule while a co-defendant gives evidence on his own behalf. Such constrained absence of a defendant during his trial upon a criminal charge is in violation of his constitutional 'right to be heard by himself and his counsel.'"[2] 91, 223. *Richards v. The State.* 1892.

To Demand Nature and Cause of Accusation and Have Copy of Indictment.

Legislature to Prescribe What Shall Constitute "Accusation"—Accused Entitled to a Copy of This.—The imperfection in the indictment relied upon was that it did not charge that the base coin was kept in possession with intent to pass the same. CARUTHERS, J.: "The statute for 1842, which is in substance contained in the Code, sec.[3] 5135, certainly cures this indictment, and sustains the judgment of the court in overruling the motion in arrest, so far as it rests upon that ground. There is no argument against a plain statute. It puts an end to reasoning, and stops investigation. Unless, indeed, it be in conflict with the Constitution, and then, of course, it is a nullity. It is argued that such is the case here. . . . It must be left to the legislature to prescribe what shall constitute the 'accusation'—in what form the crime shall be charged. A copy of this he has a constitutional right to demand. The Constitution has not prescribed the form in which the accusation shall be made. This is left for the legislature, and it has performed that duty, in this regard." 40, 28. *Sizemore v. The State.* 1859.

Entitled to Copy of Indictment Two Days Before Trial.—In this case, SMITH, J., held: "Under the Constitution and laws of this State, a defendant indicted for a capital offense, if he is in actual confinement, is entitled to a copy of the indictment[4] prepared against him, at least two entire days before the trial, unless he expressly waives the right." 46, 297. *Nokes v. The State.* 1869.

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[1] T. & S., 5195; M. & V., 6025.
[2] See Acts of 1887, ch. 79.
[3] T. & S., 5135; M. & V., 5964.
[4] T. & S., 5201; M. & V., 6034.

Indictment Need Not Allege Where Offense Was Committed, But Proof Must Show This.—DEADERICK, J.: "The objection to the indictment, which is for profanity, is that it does not allege that the profane words were spoken in Knox county. While the better practice is, in all cases, to state the venue in the body of the indictment, by section [1]5125 of the Code it is provided that 'it is not necessary for the indictment to allege where the offense was committed, but the proof shall show a state of facts bringing the offense within the jurisdiction of the county in which the indictment was preferred.' This section of the Code is not in conflict with the 9th section of article 1 of the Constitution, which declares that the accused has a right to demand the nature and cause of the accusation against him, and to have a copy thereof. These are fully set out in the indictment, and the law requires that the proof should show that the offense was committed in the county in which the indictment was preferred." **50**, 65. *State v. Quartemus.* 1870.

Indictment or Presentment Must State Facts.—FREEMAN, J., held: "A presentment charging that the defendant did wilfully, etc., assume to be a justice of the peace, and did take upon himself to act as such, not being a 'legal, qualified' justice of the peace, without showing wherein his want of legal qualification consists, is bad." . . . He said: "The object of this provision is unmistakable and clear that a party accused should know from the statements and allegations of the indictment or presentment against him not only the charge against or accusation, but its nature and cause. It is intended to give him notice of the facts sought to be proved against him in order to his conviction, and for this purpose he is entitled to have a copy of the accusation." **50**, 257. *Daniel v. The State.* 1871.

Record Must Show Failure to Furnish Copy.—MCFARLAND, J., held: "To entitle the prisoner to the benefit of a failure to furnish him with a copy of the indictment, the record must show that the copy was not furnished, otherwise the Supreme court will presume that it was furnished or waived." *Davis v. The State.* 1873.

Indictment May Be Read From Minute Book.—FREEMAN, J., held: "The defendant in felony cases may lawfully be put upon his trial upon copy of indictment copied from the minutes when the original has been 'lost, destroyed, misplaced, or [2]purloined.'" **66**, 155. *Currey v. The State.* 1874.

This Right Not Restricted to Capital Cases.—SNEED, J.: "Before his trial was commenced the prisoner demanded a copy of the indictment against him, which was refused. This was error. . . . To give effect to this provision of the organic law, the statute provides that 'every

[1] M. & V., 5954.

[2] T. & S., 5138; M. & V., 5967.

person indicted for a capital offense, if he is in actual confinement, is entitled to a copy of the indictment at least two entire days before trial.' Code of Tenn., sec. 5204[1]. In the opinion of the court there is no authority for the restriction of this constitutional right to capital cases. It applies alike to all criminal prosecutions. The prisoner has the right to waive the right, and if he does not demand it, such waiver will be implied. But when demanded, it is error to refuse it." 68, 230. *Moses v. The State.* 1877.

Essential Requisites of a Criminal Charge — Copy of Indictment — Object of this Clause.—FREEMAN, J.: "The Constitution has fairly indicated what are the essential requisites of a criminal charge when it provides, 'the accused shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof.' The clear implication is that such paper shall furnish him a statement of the nature and cause of the accusation." COOKE, J., dissented. 82, 466. *Woods v. The State.* 1884.

To Meet the Witnesses Face to Face.

Practice in England and Under Constitution of North Carolina — Depositions Taken at Examination Before Justice of the Peace Admissible.—WHYTE, J.: "The English practice under the second and third Ph. and M., ch. 10, always has been to read the depositions of witnesses taken upon oath, in the presence of the prisoner and the magistrate before whom he has been brought on a charge of felony, and to give them in evidence on the trial of an indictment for the same felony, if it be proved on oath to the satisfaction of the court, that the witness is dead. Phillips, 277, and the cases there cited. Our Act of 1715, ch. 16, is substantially the same with the second and third Ph. and M., ch. 10, on this point, and always has been practiced under in the State of North Carolina, since the Revolution, as well as before. It has been retained by Judge Iredell in his revisal of the laws of that State, which shows his opinion to be, that its provisions were not repugnant to the North Carolina Constitution; and we have an adjudged case in the Supreme court of that State, in the year 1794, where, in a case of horse-stealing, a deposition was offered in evidence, that was taken in the absence of the prisoner. It was rejected on the ground, that it was not taken in his presence, when he could have had the liberty to cross-examine. This case necessarily admits the principle, that depositions, under proper circumstances, may be read on trial against a prisoner; and the act of 1715, ch. 10, is adverted to as the law of the land. State *v.* Webb, 1 Haywood, 104. Our Constitution is substantially the same, on the point on which this objection is founded, with the Constitution

[1] M. & V., 6034.

of North Carolina. The expression in our Constitution, sec. 9, is 'the accused has a right to meet the witnesses face to face.' In the Constitution of North Carolina, it is, sec. 7, 'every man hath a right to confront the accusers and witnesses with other testimony.' The expressions in both mean the same thing, and any implications that might be raised on the diction in the one case, with the same and equal propriety might be raised in the other. It therefore seems to me, that as the Act of 1715, ch. 10, has been considered the law of North Carolina since the Revolution, and depositions pursuant thereto have been read in evidence upon trial, upon a proper ground laid and proved, without being considered an infringement of their Constitution; and as our Constitution and practice are the same, we can see no reason for a change of that practice; but, on the other hand, a change as contended for would carry with it an inducement for the commission of additional crimes; for were it a rule, that the evidence taken under the Act of 1715, ch. 10, upon a commitment, could not be read in evidence on the trial of the indictment for the same offense, the death of the witness upon trial would be tantamount to an acquittal; and the inducement to procure the former, to wit, the death of the witness, would be precisely as great as that to effectuate the latter or the acquittal." 10, 59. [1]*Johnston v. The State.* 1821.

Admissions by Attorney General that Witnesses, if Present, Would Testify to Facts Contained in Affidavit, Does Not Deprive Defendant of His Right to Continuance.[2]—REESE, J.: "The Circuit court thought, as we do, that the affidavit was sufficient and refused to continue the cause, because the attorney general offered to admit, not that the facts stated in the affidavit were true, but that the witnesses there mentioned would, if present, testify as stated by the defendant. In the case[3] referred to in 10 Yerger, we say that the practical operation of such an arrangement upon the rights and the fate of the defendant must often, if not always, be perfectly illusory. We now go further than the intimation contained in that case, and say that when the admission of the counsel for the State is not merely that the witnesses would testify as stated, but that the facts are true as set forth in the affidavit, such admission should not preclude the defendant in a criminal case from his constitutional right of having the witnesses personally present at the trial. It were needless to urge upon practical and enlightened minds the difference, in point of legitimate effect, between the personal presence of candid and respectable witnesses who testify to facts in their detail, ramification, and bearing, and the general admission of these by an attorney general, little impressing, perhaps, the minds of the jury, and constituting, as to its extent and bearing, a fruitful source of difficulty

[1] Overruling State *v.* Atkins, **1**, 229.
[2] See State *v.* Baker, p. 76.
[3] Gray *v.* The State. But not reported.

and dispute. It were needless to urge how such a practice would tempt the unfortunate defendant, if he must forego the advantage of the personal attendance of his witnesses, to seek an undue equivalent by amplifying, at the hazard of perjury, the statement in his affidavit, so as to obtain the broadest possible admission from the State. In every view, therefore, as it regards the rights of the defendant, and the safe, equal, and pure administration of justice, the practice referred to is improper and erroneous." 19, 197. *Goodman v. The State.* 1838.

This Provision Intended to Ascertain and Perpetuate a Principle in Favor of the Liberty and Safety of the Citizen — Dying Declarations Admissible — Compulsory Process. — REESE, J.: "For the plaintiff, it is insisted, that the Circuit court erred in permitting the declarations of Mary Anthony, the deceased, made *in articulo mortis*, to go to the jury as testimony, . . . as being contrary to the Bill of Rights, which secures compulsory process for witnesses in behalf of defendants in criminal cases; and provides that they shall be confronted with the witnesses against them. . . . We are all of opinion that the Bill of Rights can not be construed to prevent declarations properly made *in articulo mortis*, from being given in evidence against defendants in cases of homicide. The provision in the Bill of Rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of our Revolution, had been yielded to the liberal or popular party in Great Britain after a long contest, and after very strenuous opposition from the crown, from crown lawyers, and, if I may so speak, crown statesmen. In this case, as in that of libels and some others, the object of the Bill of Rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest. That our view of this question is correct is made manifest by the fact, that, after more than forty years from the adoption of our first Constitution this argument against the admissibility of dying declarations on the ground of the Bill of Rights is for the first time made, so far as we are aware, in our courts of justice, and if made elsewhere, it does not appear to have received judicial sanction in any State." 19, 278. *Anthony v. The State.* 1838.

Deposition of Deceased Taken Before Committing Magistrate With Knowledge of Defendant, Admissible. — REESE, J., held: "In the trial of a prisoner for murder, the deposition of the wounded man, taken by the committing magistrate as part of the proceedings of commitment, is admissible if the prisoner knew the deposition was being taken, and had the opportunity to cross-examine, although he declined to be present, or to cross-examine; and where many witnesses were examined by the

prisoner as to the declarations of the wounded man, with a view to weaken the force of his deposition, the State may, as rebutting testimony, introduce witnesses to give the statements of the deceased on the same subject, and the evidence was admissible in chief to fortify the deposition by showing that the deceased had been consistent and uniform in his statements."[1] 22, 344. *Bostick v. The State.* 1842.

Evidence of a Deceased Witness in a Criminal Case—English Rule—Rule in Civil Cases.—TOTTEN, J., held: "Upon the trial of a prisoner for larceny, it is competent to prove, on behalf of the State, by any person who heard it, the testimony of a witness who was examined before the committing court in the presence of the prisoner, and it is not necessary to prove the exact words of the witness, but only the substance of the entire examination." In delivering the opinion he said: "The right of the accused 'to meet the witness face to face' is next in importance and value to the right of trial by jury, and it should be fully conceded and secured to him, according to the true intent and meaning of the Constitution. It is urged that the admission of proof of what the deceased witness stated at a former trial is a violation of the right, and the case of the State *v.* Atkins, 1 Tenn., 229, and Peake's Ev., 90, are relied upon. The case in Tenn. R. supports the position. The court, in delivering their opinion, say that, though no cases in point have been produced, they understand that such evidence could not be received agreeably by Magna Charta; and they also place the objection on the ground of the constitutional provision before referred to. The reference to Peake's Ev. states briefly that such evidence 'is not allowed in a criminal prosecution,' and Fenwick's case is cited, 4 St. Tri., 265. In 2 Phil. Ev. C. & H., note 561, it is said the reference does not warrant the principle stated; that the case was that Lady Fenwick had spirited away a material witness who had sworn against Cooke on his trial for the same treason for which Sir John Fenwick was impeached, and reference is made to 5 Harg. St. Tr., 62. But see 2 Hawk. P. C., ch. 46, sec. 17. The right of the accused to confront the witness against him is doubtless declared in all the American constitutions, State and Federal; yet, in the case of U. S. *v.* Wood, 3 Washington C. C., 440, for robbing the mail, a capital offense, no objection of the kind was made, but proof of what a deceased witness had sworn on a former trial was held admissible, subject to certain restrictions, or to its being in the very words of the deceased. See Phil. Ev. C. & H., note 437. In the case of Commonwealth *v.* Richards, 18 Pick., 437, the constitutional question was expressly raised, and it was held that proof of what a deceased person stated at a former trial, in a criminal prosecution, was legal and competent. In this case, the case of The State *v.* Atkins, 1 Tenn., was

[1] This opinion also overruled that in State *v.* Atkins, 1, 229.

relied upon by the defendant's counsel. In Russell on Crimes it is stated that 'if there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness, given upon oath at the former trial, is admissible on the subsequent trial, and may be proved by one who heard him give evidence.' 2 Russ. on Cr., 683; Rex *v.* Carpenter, 2 Johns, 47; 2 Hawk. Pl. Cr., ch. 46, sec. 20. The reference in Hawkins is to the Earl of Stafford's case, in which it was adjudged 'that where witnesses could not be procured to testify *viva voce*, by reason of sickness, etc., then their depositions might be read, for or against the prisoner, on a trial of high treason, but not where they might have been produced in person.' See 3 St. Tr., 204, and Ld. Raym., 407. It will be seen that this is a much stronger case than the one now before us, and we do not cite it as admitting its authority to the extent stated. But in what manner does the admission of such proof violate the right of the accused to meet the witness against him face to face? The evidence of the deceased witness was given on oath before the committing court, in the presence of the accused, who had the right to cross-examine. He is again present when that evidence is proved by the oath of other witnesses, and has the right to cross-examine. The objection to the admission of such evidence might be urged with stronger reason, as would seem, to the admission of dying declarations on trials for homicide, where the declarations admitted for proof are not made in the presence of the accused, are not on oath, and there is no right to cross examine. It is perfectly well settled, however, that such evidence is admissible on a charge of felonious homicide, and yet is not admissible in any mere civil suit. See 2 Russ. on Cr., 684, note 2, and cases reported in this State.

"But reverse the case, and suppose the death of a material and only witness for the accused, and such an accident may not unfrequently occur, how important it is to the life, liberty, and reputation of the citizen that he have the benefit of such evidence when wrongfully accused. The admission of such evidence is more important to the accused than to the prosecution. The State could dispense with the punishment of an occasional offender without any material public injury, but the success of the defense is all important to the individual accused. And when it is considered that the effect of all evidence is to reflect light and truth on the matter in issue, to enable the forum before which it is tried to arrive at a just and true result, it would seem the more reasonable and proper course to favor its admission, where it is valuable in itself and not under the ban of well guarded legal objection. We are, therefore, of opinion that evidence of the character in question is legally competent, and should be permitted to go to the jury, in criminal as well as civil cases." **29**, 485. *Kendrick v. The State.* 1850.

Official Records, Bonds, Papers, Etc.—Certified Copies Admissible as Evidence—Not So in Cases of Forgery or Perjury—T. & S. 3791.—JOHN C. GAUT, Sp. J., held: "This section of the Code is not in conflict with the Bill of Rights, which provides that the witness shall meet the prisoner face to face. In such a case the paper is the witness; and a copy of the paper is substituted instead of the original paper. The rule would be different under an indictment for forgery or for perjury, in some judicial proceedings. The original paper upon which the perjury or forgery was assigned, would have to be produced, and a copy could not be read. But in this case, the account filed in the office of the comptroller, only forms a link in the chain of testimony to show the amount of money received by the prisoner from the State, and was material to establish the felonious breach of trust charged against him in the indictment. In such a case, a certified copy may be read in evidence against him." **47**, 96. *Reeves v. The State.* 1869.

This Provision Refers to Witnesses for the State.—TURNEY, J., said that this provision "has reference to witnesses in support of the prosecution, and not to witnesses on behalf of the defense. This has long been settled in this State by the statutory[1] enactment allowing persons charged with crime to take the depositions of witnesses. That statute has been repeatedly acted upon, and held by this court to be constitutional." **72**, 328. *Petty v. The State.* 1880.

Witness—Statements in Affidavit—When Evidence.—FREEMAN, J., held: "When the witness is within the jurisdiction of the court, but unable to be present at the trial, and there has been no failure of diligence on the part of the defendant, he cannot be compelled to take what he assumes he can prove by the witness as set out in his affidavit for a continuance, as the testimony of the witness, upon the agreement of the district attorney that the statements of the affidavits should be read as the testimony of the absent witness," and said: "It would ill accord with the spirit of that right, where the witnesses are within the reach of the process of the court, if the defendant is compelled to take a mere written statement as the equivalent of the personal presence contemplated by the use of the process guaranteed to him by the Constitution." This case was distinguished from Petty *v.* The State in that the witness in the present case was within the jurisdiction of the court, while in Petty *v.* The State, the witness was a non-resident of the State. **81**, 326. *State v. Baker.* 1884.

To a Speedy Public Trial By an Impartial Jury.

Undue Excitement—Venue—Duty of Court to Change.—HARRIS, J.: "This case strongly admonishes us of the necessity of a watchful vigi-

[1] M. & V., 6223.

lance and an unyielding firmness on the part of judicial officers to see that the invaluable right of a fair trial by an 'impartial jury' should not be disregarded. And where such jury can not be procured, on account of undue excitement, in the county where the prosecution is pending, the court should change the venue to some other county free from such objection. This provision securing to the accused the right of trial by an 'impartial jury,' is not unmeaning—was not placed in our Bill of Rights without motive, and can not be disregarded by the courts." 36, 613. [1]*Major v. The State.* 1857.

Act Disqualifying Jurors Because of Political Opinions Unconstitutional—"Franchise Laws" of the Reconstruction Period.—TURNEY, J.: "It is objected by plaintiff in error, that the circuit judge erred in overruling his objection to challenges made by the attorney general to the competency of fifteen jurors, otherwise competent, than that they 'had not certificates to vote under the Franchise Acts of the legislature of this State.' This exception to the ruling of the court was well taken. The action of the court was founded upon sec. 1, ch. 5, of the Act of 26th of November, 1866, that in all trials of civil or criminal cases in any of the courts of this State, it shall be good ground of challenge for cause as to competency of any juror, that such juror is not a qualified voter of this State. This legislation was had with reference to that of June, 1865, and May 3, 1866, and is a precedent qualification of that of 25th February, 1867, inappropriately denominated the 'Franchise Laws.' The Act of November, 1866, entitled 'An Act to define the qualifications of jurors,' is unconstitutional and void. 'That the right of trial by jury shall remain inviolate,' is a positive and inalienable, as well as constitutional, guaranty to every citizen of the State. The Constitution secures to the accused . . . a speedy public trial, etc. . . . Under this statute do these fundamental principles obtain? No dispassionate and just mind can for a moment think so. Reading it in the light of the acts to which it has reference, and of which it is in fact a part, it is plain it was the offspring of wild political passions, intended to build up one political party and tear down another, and to destroy that equilibrium which paralyzes fanaticism and begets conservative justice. It can not be 'an impartial jury' selected and qualified alone because of its political opinions, produced in times of high excitement resulting from a bloody civil war, in which the State was distinctively divided against itself. . . . By the statute under review, the constitutional provision, 'that the right of trial by jury shall remain inviolate,' is abrogated, and the guaranty of trial by an impartial jury, is expunged from the Declaration of Rights." 50, 76. *Gibbs v. The State.* 1871.

[1] See same case, art. 1, sec. 10.

"Impartial Jury"—Definition of—History of This Provision—Impartial Juror—Who Is—Opinions—Newspaper Account Will Disqualify Juror—When.—The act under consideration was that of 1870–71, ch. 51 (Shankland, 159), which provided that no juror should be disqualified by any opinion which he may have, based upon any published account of the facts of the offense with which the prisoner is charged. NICHOLSON, J.: "The clause in our Constitution which guarantees to those accused of crime 'a public trial by an impartial jury' is one among the many provisions in that instrument which have descended to us from the great charter of English liberty, which are declaratory of the rights of the people, and which have acquired a well-understood meaning, and must therefore be presumed to have been adopted in view of that meaning. If, therefore, the term 'impartial jury' has been defined in the history of constitutional law, it is to be assumed that the sense fixed upon the words in legal and constitutional history, where they have been employed for the protection of popular rights, is the sense in which they have been adopted in our Constitution. Cooley's Const. Lim., 60. According to the definition of our standard lexicographer, a man who is 'impartial' is one 'who is not biased in favor of one party more than another;' who is 'indifferent; unprejudiced; disinterested; as an impartial judge or arbitrator.' The primary idea contained in this definition, is freedom from personal bias, indifference between the parties as persons; 'not prejudiced' against one or the other; 'disinterested' as between them.

"But it is clear that the word was not used exclusively in its primary sense, but in its secondary or more general sense—as freedom from any bias, or indifference, or disinterestedness—for we find that Sir Edward Coke, in enumerating the principal causes of challenge *propter de fectum*, specifies the following: 'That a juryman is of kin to either party within the ninth degree; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has been arbitrator, or declared his opinion on either side,' etc. 1 Tidd., 853; Co. on Lit., 156; 3 Bur., 1856; 5 Bac., 353. It appears from these authorities that the fact that a juryman 'had declared his opinion,' on either side, was a principal cause of challenge on the ground that he was not 'impartial.' But it was competent for the legislature to change or modify this rule of the common law, unless it has become so engrafted upon the Constitution of the State as to be irreparable or unalterable by the legislature. The guaranty of a trial by an 'impartial jury' has been secured to the accused in exactly the same language in the Constitutions of 1796, 1834 and 1870. It would be a remarkable fact if the legal import of the words 'impartial jury,' as used in all three of our Constitutions, should now be a matter of sufficient uncertainty to render it necessary to resort to a philological

investigation to ascertain their true meaning. They were introduced into the Bill of Rights in 1796, and we are to presume that they were adopted with a full understanding of their legal import, as ascertained and settled by judicial interpretations in England. But if there was any doubt as to this proposition, if we shall find that there has been an unbroken chain of judicial construction from 1796 down to 1834, when the same words were again adopted in the Constitution of that year; and that from 1834 down to 1870, when the same words were adopted for the third time in the Constitution of that year; and if we find, throughout this succession of decisions, the same construction has been uniformly placed upon the words, we are forced to the conclusion that that construction is to be regarded as the true legal, judicial and constitutional meaning of an 'impartial jury.'"

He then reviewed the previous decisions interpreting these words, and said: "Without reviewing the cases further, we have cited enough to establish beyond controversy the proposition that, during the existence of the Constitution of 1796 and 1834, the legal meaning of an 'impartial jury,' was one which had neither formed nor expressed an opinion as to the guilt or innocence of the accused, whether from conversing with the witnesses, or hearing them converse, or hearing a narrative and detail of the facts. If we had any doubt as to the correctness of the interpretation of these words, repeated through a period of three-quarters of a century, it would approach to rashness and presumption in us to disregard such authority. But we have no such doubt, and therefore recognize it as the settled meaning of the constitutional guaranty that the accused has the constitutional right to be tried by jurors who are 'impartial,' and that none are impartial who have formed or expressed their opinions, either from hearing the evidence or from hearing others detail it who did hear it, or from conversing with those who professed to know the facts and to give a detail of them, or from hearing such persons in conversation with others giving such details. When the Constitutions of 1870 was adopted, the same language, which had thus been judicially interpreted, was again readopted, and, we have a right to presume, with full knowledge of its uniform interpretation in the Constitution of 1796 and 1834. This being so, this interpretation of the language becomes incorporated with the Constitution of 1870 as part of the fundamental law of the State. The decisions which have fixed the true meaning of the words 'impartial jury,' also establish the position that a juror who is incompetent from having formed or expressed an opinion as to the guilt or innocence of the accused, can not render himself 'impartial' by expressing his belief, on his examination, that he can render a fair and impartial verdict according to the law and the proof, notwithstanding the opinion then in his mind. . . .

"When the Constitution guarantees to the accused an impartial jury, it necessarily means that he is entitled to a jury which can enter upon the examination of his case, conceding to him the full benefit of that presumption of innocence which the law gives to every prisoner as a matter of right. This presumption entitles him to an acquittal until it has been overturned by plenary proof. In the formation of the jury under the statute in question, the prisoner may have forced on him as his triers twelve men, who will enter the box with the conviction on their minds that he is guilty, and he must stand convicted in their judgments until he has by full proof, overcome their convictions of his guilt and established his innocence. This would be a virtual reversal of the fundamental principle, that the law presumes the accused to be innocent until the proof shows him to be guilty. It is little else than a mockery to try the competency of a juror by asking if he has formed and expressed his opinion of the guilt or innocence of the accused, and when he answers that he has upon having heard or read the facts, then to take him as an impartial juror, upon his belief that he can divest himself of his convictions and render a fair and impartial verdict. A prisoner whose life or liberty is submitted to a jury composed of such men, can not be said to have a fair trial by an impartial jury.

"We hold that an impartial juror is one who enters the box indifferent between the parties, indifferent in feeling and in opinion. Either partiality or prejudice, in the usual acceptance of these words, or an opinion based on the supposed facts of the case, already existing in his mind, renders it impossible for him to be indifferent, and therefore to be impartial. If he is partial or prejudiced, he will enter upon the trial predisposed to follow his partiality or prejudice in weighing the testimony. If he enters the box with an opinion already made up, he will be in danger of so viewing and weighing the testimony as to sustain and confirm his existing impressions. One of the jurors who was put to the prisoner in this case as competent, stated that the impressions made on his mind by reading the detail of facts as they were given in the newspaper, were such that the proof to remove them must be full. When could a jury composed of men such as the juror referred to be said to be indifferent? Certainly never, until their convictions of guilt had been removed by full proof of innocence. Is it not an abuse of language to call such a jury an impartial one? To be an impartial jury, they should enter the box indifferent at the time of entering it, between the State and the accused. The courts have gone to the verge of the law in holding that a juror who has formed and expressed an opinion on mere rumor, may be an impartial juror. We recognize such to be the settled law, but we are not disposed to go further in that direction." **65**, 468. *Eason v. The State.* 1873.

Special Court — Jury — Selection From Part of County.—The question here was the validity of the Act of 1891, ch. 26, sec. 5, establishing a special law court at Rockwood, and requiring that all jurors selected for that court be from that portion of the county embraced within the jurisdiction of the court. T. S. WEBB, Sp. J.: "It is insisted that the fifth section of said act is unconstitutional, because that section requires the jurors for the Rockwood court to be taken from the resident citizens of the sixth, seventh, eleventh, twelfth, and thirteenth civil districts of the county, instead of from the citizens of the whole county, or, as counsel says, from 'the body of the county.' . . . If the jury is made up of citizens of any part of the county, who are otherwise qualified, the requirement of the Constitution is complied with. The common impression that the jury must come from the entire county is derived from the Code, sec. 3985, which requires that one of the jurors designated for the Circuit court 'shall reside in each civil district into which the county is divided, and where the number of districts and the number of jurors do not coincide, the selection should be made with as much equality as possible.' But [1]sec. 3987 provides that 'no mistake or omission, however, in complying with the above provisions in regard to the residence of the jurors designated shall amount to a disqualification.' The Code provision thus appears, by its own terms, to be directory merely; and, if this were not so, still the Code is no more than an act of the legislature, and is subject to be amended or repealed by subsequent acts." **92**, 97. [2]*Ellis v. The State.* 1892.

Of the County in Which the Crime Shall Have Been Committed.

This Right Can Not Be Infringed By the Legislature, Even.—CARUTHERS, J.: "By the Constitution, the accused has a right to be indicted in the county where the offense was committed; and we held at this term, that this right can not be infringed, even by the legislature. However this question may have been decided before the Code, or by the common law, it is now, under the [3]Code, only a matter of construction. We think it clear, that by this section, 'to continue to cohabit with such second husband or wife, in this State,' is a distinct and complete offense, and as much cognizable in the county where it occurs as the crime of bigamy is in the county where the second marriage took place. The offender could not be charged for the latter crime in any other county than that where it occurred; but, as to the former, it may be in a different county, and must be located by the facts, as well as the other." **40**, 546. *Finney v. The State.* 1859.

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[1] M. & V., 1762.

[2] See same case, art. 6, sec. 1; art. 10, sec. 4.

[3] M. & V., 5652.

The Fact That the Offense Has Been Committed in a County is What Gives That County Jurisdiction—Venue Must be Proved and Shown in Bill of Exceptions—Judicial Construction.—TURNEY, J., decided that the Code of 1858, 5242, sub-sec. 9, which prohibited the reversal of a judgment "because the bill of exceptions omits to state that the venue was proven in the court below" was unconstitutional. The attorney general presented a petition for rehearing. TURNEY, J.: "The opinion delivered on a former day does not hold 'that the legislature is powerless to cure defects in criminal procedure in any case,' but does hold that the legislature, in its efforts to cure defects, must confine itself to the powers given it by the Constitution; and if it shall transcend such power, its acts are void. The Constitution is the supreme law; the legislature is its creature; that the creature shall be greater than, or even equal to its creator, is a legal as well as a natural impossibility. It is the fact that the offense has been committed in a county that gives the court of that county jurisdiction to try the accused. The fact is an ingredient absolutely necessary to conviction, and must (not merely may) be made to appear. Take the provision of the Code, making it unnecessary to lay venue in the indictment, and the provision involved here, put them together, and bring to this court a case only made out by their application, and we have a proceeding as nearly void of form and substance as it is reasonably convenient to imagine. . . . 'Judicial construction of Constitution has gone to the verge of liberality. To it mainly attaches the sad responsibility of our struggle, in its evening twilight, to preserve the fragments of organic security. Stare decisis.'" **50**, 439. *Mayes v. The State.* 1872.

In the case of Alexander *v.* The State, **50**, 481 (1872), NICHOLSON, J., adhered to the above opinion in Mayes *v.* The State, without discussion.

Venue of Accessory Before the Fact.—SNEED, J., held: "The *locus in quo* of the offense of an accessory before the fact to the crime of murder, is in the county in which the murder is done. The crime is only complete when the murder is done, and the jurisdiction for the trial of the criminal is where the murder is done."[1] **67**, 96. *State v. Ayers.* 1874.

Change in Boundary of County.—Right of Trial in County Having Present Jurisdiction of Place Where Offense Was Committed—A Personal Right.—Pursuant to the Act of the General Assembly creating the county of Moore the commissioners fixed the western boundary of said county nearer than eleven miles from the county seat of Lincoln. Lincoln did not object. The homicide was committed within the boundaries of Moore county, after it was laid off, but at a point less than eleven miles from the county seat of Lincoln, from which that portion of Moore was

[1] T. & S., 4591, 5342.

taken, and it was insisted that although the killing took place in Moore county, as organized, yet that the place is really in Lincoln county because of the unconstitutional running of the west boundary line of Moore.

NICHOLSON, J., held that there was nothing on the face of the act showing its unconstitutionality, and said: "The question then presents itself, had the defendant a right to raise the question of the invalidity of the act on the ground that the western boundary line is void because established nearer than eleven miles of Fayetteville? He has the undoubted right to be tried by a jury of the county in which his crime was committed. Was he deprived of this right by a trial in Moore county? Does his right of trial in the county where his crime was committed mean anything more than that he has a right to be tried in the county organized and established, as a political corporation of the State, in which his offense was committed? His right is that of trial in the county which has jurisdiction of the place at which he committed the offense. It is a personal right, which is controlled by the law fixing the boundary of the county in which his offense was committed. It is not such a vested right as authorized him to require the court to determine whether the boundaries of the county are constitutionally established or not. The defendant had no such vested right of trial in the territory of Lincoln county as would be violated by the Act of the Legislature in cutting off a fraction thereof, in making the new county of Moore. His right of trial in the county of Moore was as perfect as it had been in Lincoln county as soon as Moore was organized and established as a political corporation. Down to that time defendant could not be deprived of his right, but after the county of Moore was vested with jurisdiction over her territory the right to inquire into the legality of the western boundary belonged alone to the county of Lincoln. She had a vested right in all her territory, and could institute judicial proceedings to reclaim any portion thereof illegally taken from her by running the western boundary of Moore nearer than eleven miles to her court house. But so long as Lincoln county acquiesces in the boundary which cuts off a portion of her territory, the jurisdictional right of Moore county over the territory so cut off can not be questioned in any collateral proceeding pending in the courts of either county." 66, 52. *Speck v. The State.* 1872.

Acts Extending Jurisdiction Over Crimes.

This Provision for the Benefit of the Accused — Crime Committed Within One-Quarter Mile of County Line — Act Providing Jurisdiction Unconstitutional. — CARUTHERS, J.: "The evil intended to be remedied by sec. 4976, was, that where crimes were committed on, or near a county line, it might turn out in the proof, after a fair and expensive

trial had fully established the guilt of a defendant, that the indictment was in the wrong county, and the prosecution would be defeated on the ground alone, that the prosecution was in the wrong county. A few yards or feet would save the greatest offenders from punishment, as the Constitution forbids that a man should be put a second time in jeopardy of life or limb, for the same offense. It was for this very commendable reason, a margin of one-fourth of a mile was given by the Code for the venue. It ought to be maintained, if it could be, under the Constitution. But can it be? Is it not in direct conflict?

"The worst criminals have their rights. Some of them are enumerated in the section of the Constitution under construction. They must be secured as effectually as any other constitutional rights. One of these rights is, to be tried by an impartial jury 'of the county or district,' in which the offense has been committed. This legislative provision is, that he shall not, in all cases, have that right. But that, he may be indicted, and tried by a jury of a different county, in the given case. If it be no infraction of this right where the place of the crime is within one-fourth of a mile from the line, it would not be, if it were one or ten miles. The case is very strongly put in the Constitution: The accused shall have the right to be tried, etc. The word 'district,' does not aid the argument. That had reference to the state of things under the old Constitution, at a time when there was only one court for several counties, constituting what was called a district. It does not apply to circuits. It was carried into the present Constitution, by copying from the old, without noticing the change which had taken place in our judicial system, by which a Circuit court was held in every county. Since that was done, the word district in this connection, has no application, and nothing to operate upon.

"But it is argued, that this construction would defeat and annul all the laws on the subject of a change of venue in criminal cases. We do not think so, and adhere to the decision in Dula *v.* The State, 8 Yerg., 512, in which those acts are held to be allowed by the Constitution. The reasoning in that case, is entirely satisfactory. This is a very different question. Those acts are made for the benefit, and to enlarge the rights of the accused. The Constitution does not say that no other county shall try him, or have jurisdiction of the case, but only that he shall have a right to be tried where the offense is charged to have been committed. The legislature says, in these acts, now a part of the Code, sec. [1]5195, that, if an impartial jury cannot be had there, and that is made to appear, by the affidavit of the defendant and others, or by the observation of the court in attempting to get a jury, the case may be sent to another county, not obnoxious to the same objections. Those acts provide that the accused shall not be deprived of the right to a

[1] See T. & S., 5195; M. & V., 6025.

'*speedy public trial by an impartial jury*,' because, or where, such a trial and jury can not be had in the county of the offense. This whole section in the Declaration of Rights, is for his benefit, and so are the acts allowing a change of venue in the cases prescribed. There can be no question of this, where the accused applies for, or consents to, the change. How it would be where it is done without or against his consent, either express or implied, it might be improper now to say, as that point is not involved, necessarily, in this discussion. But in those cases, it will be observed, the prosecution is instituted in the proper county, and subsequent events render it necessary to change the form of trial, to protect the constitutional rights of the accused to a speedy, impartial trial, or prevent a failure of justice. . . . This section of the Code is unconstitutional and void." **41**, 341. *Armstrong v. The State.* 1860.

Offenses Committed Beyond the State—U. S. Constitution, Art. 3, Sec. 2, and Sixth Amendment.—NELSON, J., held: "The Code of 1858, sec. 4981, providing for the punishment of offenses committed within five miles of the State line, on board of vessels engaged in navigating waters of the State was unconstitutional." After citing the cases of Armstrong *v.* The State, and Kirk *v.* The State, he said: "There is no difference, in principle, between these cases and the section of the Code now under consideration. The convention which recently formed the new Constitution of this State, permitted the clause in the Declaration of Rights, to remain unaltered, with a full knowledge, as is to be presumed, of the decisions above mentioned, which, in our judgment, rests upon sound principle, and ought not to be disturbed. The Acts of Congress which provide for the punishment of crimes and misdemeanors committed upon the high seas and the lakes and navigable waters of the United States, not subject to the jurisdiction of the States, are founded, in part, upon that clause which gives Congress the power 'to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;' and are further authorized by art. 3, sec. 2, of the National Constitution, which, among other things, declares that 'the judicial power shall extend to all cases of admiralty and maritime jurisdiction,' and are not in conflict with the Sixth Amendment, which declares that 'the accused shall enjoy the right of a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed.' . . . These provisions of the National Constitution, and the opinions pronounced upon the statutes enacted under them, are not in conflict with the former decisions of this court, and there is no provision in our State Constitution as to admiralty and maritime jurisdiction." **50**, 230. *Craig v. The State.* 1871.

Change of Venue from One County to Another.

The Legislature Can Not Abridge, but May Enlarge the Right to a "Speedy Public Trial," etc., by Authorizing Venue Changed to Another County.—GREEN, J.: "It is insisted that the Circuit court of Warren county had no jurisdiction to try and determine this cause, for that the [1]Act of Assembly of 1817, ch. 30, authorizing a change of venue in criminal causes, is unconstitutional. . . . The rights which in this section are secured to the accused in criminal prosecutions can not be taken away from them by any act of the legislature. It does not follow, however, that because the legislature can not abridge those rights it can not enlarge and add to them. The accused hath a right 'to a speedy public trial, by an impartial jury.' If such a trial by such a jury can be had in the county where the crime was committed, the right to be tried there is a very important one to him. But if the prejudices of a county be excited against a party, so that he dare not ask a speedy trial, and so that he can not hope for an impartial jury, it would be a great misfortune if no other county could acquire jurisdiction of the cause. The greater and more important rights, 'a speedy trial by an impartial jury,' would be sacrificed for the sake of the one least important, and which was secured only that the others might be the more certainly enjoyed. This must have been foreseen by the framers of the Constitution, and we are not to suppose that they intended to fix the jurisdiction of a cause unalterably to the county where the offense was committed, and thereby, in some cases, defeat the principal object in the introduction of this provision, unless it be manifest from the language used that such was their intention.

"Does the language under consideration limit the jurisdiction of an offense to the county where it was committed? It says the accused hath a right to be tried there. But does the existence of this right prevent him from choosing another county, upon the court of which the legislature may have conferred jurisdiction of his cause? Suppose the language of the Act of Assembly was like that of the Bill of Rights, and also provided that in criminal cases, when the accused can not obtain a speedy trial by an impartial jury in the county where the crime was committed, he shall have a right to be tried in the most convenient adjoining county, would this provision conflict with the one secured in the Bill of Rights? Surely it would not. It would but confer on the accused an additional right, in order to effectuate the great end for which the one before mentioned was by the Constitution secured. If the construction contended for were to prevail, instead of reading the article in question, 'the accused hath the right,' it would be made to

[1] H. & C., vol. 1, p. 368; Code 1858, 5195 et seq., 5201 et seq.; T. & S., 5195 et seq., 5200 et seq.; M. & V., 6025 et seq.

read, 'the accused shall be compelled to submit to a trial in the county where the crime was committed.' Instead of being a benefit conferred, in order that a party should have a speedy and impartial trial, it would be a serious injury inflicted, in forcing a man to commit his life into the hands of a prejudiced jury.

"In addition to this view of the subject, it may be added that this section of the Bill of Rights has never heretofore been thought to prevent the passage of laws providing for the change of venue in criminal cases. Such laws have existed ever since the year 1808, and many cases have occurred where the venue has been changed several times. In the cases of Burnett *v.* The State, and Bridges *v.* The State, in 1819, the convictions took place after several changes of venue, and each of the culprits was executed under the sentence of this court. We think, therefore, that the Circuit court for the county of Warren had jurisdiction of the cause, and that there is no error in the judgment." 16, 512. *Dula v. The State.* 1835.

A Wise, Just and Necessary Safeguard to the Liberty of the Accused —Not Difficult to Construe—Act Allowing Change of Venue Against Consent of Defendant Unconstitutional.—McKINNEY, J.: "The Code provides, (sec. 5195[1],) that 'when the court, in any criminal case, upon an attempt to select or impanel a jury for the trial of the defendant, is of opinion that a fair and impartial trial can not be had in the county where the cause is then pending, the venue may be changed without the prisoner's consent.' This provision of the Code, it is insisted, is in violation of the . . . Constitution. This question is, for the first time, directly presented for our determination, and we have bestowed upon it a careful consideration; the result of which is, that this provision of the Code is inconsistent with the Constitution, in our judgment. The argument, founded upon the supposed absurd and mischievous consequences to arise out of this determination is plausible; but the force of a direct, explicit, and unequivocal constitutional principle is not to be avoided by arguments of this sort.

"What is there in this simple provision to interpret or construct? Is it possible to raise a doubt as to the intention, or proper meaning, of the clause? Our language admits of no more explicit or precise expression of intention. If it were even possible to cavil as to the phrase, 'speedy public trial,' or 'impartial jury,' it is certainly impossible to do so as regards the concluding words, 'jury of the county in which the crime shall have been committed.'

"What is the simple import of the provision of the Code under consideration? It is, that, under circumstances, the court may deny the accused this constitutional right, and force him, against his will, to be

[1] T. & S., 5195; M. & V., 6025.

tried by a jury of a different county. And upon what reason is it attempted to vindicate this enactment? This, merely, that otherwise the absurd and unreasonable consequence will, in some cases, follow, that the accused can never be tried at all. This is by no means either a necessary or logical consequence. But, if it were admitted to be so, the easy and conclusive answer is, thus the fundamental law is written.

"The practical inconvenience and mischievous consequences, which may occasionally arise out of a strict adherence to the Constitution, of which the present case is an illustration, may be an all-sufficient reason to induce the legislature to modify the existing law, as regards the necessary qualifications of jurors in criminal cases of the higher grades, but it can be no reason for a plain violation of the Constitution. For this, no possible consequences, however apparently unreasonable or absurd, can be admitted to afford sufficient reason.

"The provision of the Constitution is, in itself, a wise, just and necessary safeguard to the rights and liberty of the accused. Like all general rules and principles of law, it may, in exceptional cases, be attended with inconvenient consequences in its practical operations; but these must necessarily be submitted to, for the sake of the general salutary effect of the principle. In the existing organization of our judicial system, the clause of the Constitution in question is to be read, omitting the word 'district,' which was used in the original Constitution of 1796, with reference to the district system then existing, but which was abolished in 1809.

"The Act of 1827 was free from any constitutional objection, because it required the assent of the prisoner to a change of the venue. It will scarcely be denied that, under ordinary circumstances, a prisoner who is *suijuris*, may waive this as well as any other legal right, if done advisedly. And although the provision of the Code, as it stands upon the statute-book, is inoperative and void, because it assumes to confer upon the court the exercise of a power not allowed by the Constitution, yet, we suppose, the consent of the prisoner to the change of venue would obviate all objection." **41**, 346. *Kirk v. The State.* 1860.

Sound Legal Discretion Vested by Statute in Judge.—SHACKLEFORD, J.: "The first question presented is: Did the court err in refusing to change the venue? By the Act of 1827, ch. 30, all laws authorizing a change of venue in criminal cases, were repealed. Before the passage of this act a change of venue was had upon the application of the prisoner, if there was a prejudice against him. The Act of 1827 introduced a new policy. It took away from the prisoner all right to a change of venue, on his application, and vested the power in the circuit judge, when a fair and impartial trial could not be had, and that could only be determined after an attempt to impanel a jury. Sec.[1] 5195 of the Code

[1] T. & S., 5195; M. & V., 6025.

has relaxed the rule to some extent. . . . By this provision of the Code, the rigid rule prescribed by the Act of 1827 was relaxed. A sound legal discretion was vested in the circuit judge. He must be satisfied, from the facts presented, the prisoner can not have a fair and impartial trial in the county." 43, 357. *Hudson v. The State.* 1866.

Prisoner Must Consent to Change.—HAWKINS, J., held in this case: "A prisoner's right to be tried in the county where the offense is alleged to have been committed, is secured to him by the Constitution, and he can not in any case, be deprived of that right, without his consent being given in open court. The record, where a change of venue has been ordered, must show that the prisoner applied for a change of venue, the reasons assigned for the change, and that the defendant assented thereto." 46, 539. *The State v. Denton.* 1869.

And Shall Not be Compelled to Give Evidence Against Himself.

Testimony Before Grand Jury—Compelling Witness to Give Evidence Against Himself—Common Law Rule—Construction of Statutes, Art. 11, Sec. 1.—TURNEY, J.: "Whether the evidence demanded of the witness against himself is to apply to a case already existing, or may be used in one that may thereafter arise, it is nevertheless under the ban of the constitutional interdiction. That it may simply point out in one case how a prosecution and a conviction may be had for another and different offense, does not avoid the organic provision, and the witness can not be compelled to testify. If the witness shall criminate himself he can only protect himself by showing that he was examined before the grand jury as to the particular offense charged against him in the indictment. Owens *v.* The State, 2 Head, 455–7. It follows that if his testimony develop other offenses than the one inquired of by the grand jury he will not be protected. So far the case of Hirsch *v.* The State, 8 Baxt., 89, is not authority in the present. In that case there was no irregularity. I think the holding in that case is not sustainable upon reason or authority. Section [1]5089 of the Code, provides: 'And no witness shall be indicted for any offense in relation to which he has testified before the grand jury.'

"If, as said in Hirsch's case, 'This enactment was intended expressly to obviate the constitutional inhibition against compelling a witness to criminate himself,' it was not intended to obviate the constitutional inhibition against compelling a witness to give evidence against himself. Nor do I think that it can be maintained that the makers of the Constitution intended the words, 'give evidence,' to mean criminate in its strictly legal sense, they intended to and did use a term of more force and comprehension. Being assembled to make an organic law that

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[1] M. & V., 5914.

body certainly had before them Constitutions of other governments as guides. Certainly the Constitution of the United States, with which that of the State must be consistent, was closely consulted, and the language there is, 'shall not be compelled in any criminal case to be a witness against himself.' This is with a view to punish him. That this distinction was in the minds of the convention, and that there was a purpose in the difference of phraseology is sustained by the dissenting opinion in Hirsch's case, which was prepared by Chief Justice Nicholson, who was a member of that convention, and who, as a lawyer, jurist, and statesman, had no superior in the State, and perhaps not in the Union. In construing the Constitution, in the making of which he was a most efficient factor, he says: 'We do not concur in the conclusion that the legislature intended, or that they could if they had so intended, to deprive the witness of his constitutional right to refuse to give evidence as to his own criminality. The act of testifying constitutes the abrogation of the offense under the law. This only occurs after the witness has voluntarily waived his constitutional right to refuse to testify. If he does not voluntarily waive his right he cannot be deprived of it by compulsory law.' Mr. Nicholson certainly understood the language he approved, and properly defined it when he came to pass upon it as a judge.

"The purpose of the act is to offer inducements to persons who have committed offenses against law in connection with others to divulge the secret. There is nothing compulsory in the language, nor could there be without a violation of the Constitution. It recognizes by its terms a want of authority in the legislature to command the witness to testify, and merely offers a reward to him if he has or will do so. The witness may elect to take advantage of the law, or take chances of a discovery and conviction of himself. By it the legislature proposes to buy the evidence of one guilty man against another or others, and to pay for it by exemption from indictment for the offense in relation to which he has testified. In this case the court has undertaken to compel the witness to give evidence against himself. The Constitution says this shall not be done. The court claims the authority under section 5089. Both the legislature and the courts are creatures of the Constitution, and must conform their actions to its provisions. The legislature could not say the witness shall testify, but could and did say, if he will, etc., and the courts can do no more. The witness must determine for himself whether he will accept the legislative reward offered for his testimony. Whether the constitutional protection thrown around offenders is good or bad policy, is a question with which courts and legislatures have no concern. They must support and enforce the Constitution as they find it. Being its creatures they must obey its mandates, and not evade them by strained constructions for any emergency, however important to public weal it may seem.

"The language of both the Constitution and the statute is plain, simple and unambiguous. The one is positive in prohibiting compulsion, the other simple in its offer of inducement and reward to an offender to betray his fellows by voluntary election to testify for the sake of protection to himself. At common law the rule is, that if an associate in crime will reveal upon his fellows and testify against parties to the same crime, he may reasonably hope the State will in consideration pardon his offense. It was a part of the rule that the government was not bound to apply to it. The object of the hope held out by that rule was to increase the means of discovery and punishing offenses. Our law makers recognizing the utility of the rule, but seeing that it did not accomplish to any great extent the ends aimed at, modified it by converting a bare hope into an absolute assurance, making it a positive mandate instead of a discretion resting in the breasts of courts and attorneys general. So that our statute is nothing more than the common-law rule made certain of application.

"Under the common-law rule the offered witness could not be compelled to testify; then why should a different practice obtain under the same rule declared by statute in more direct and trustworthy terms under a Constitution protecting a witness from giving evidence against himself, while the common-law rule is untrammeled by Constitution except as it comes of usage and precedent? . . . The constitutional declaration that the accused shall not be compelled to give evidence against himself applies in all stages of the prosecution, from the very first step to the last. That declaration has no qualification or condition. It is positive and absolutely prohibitory. It contains no word from which it can be inferred that the legislature or the courts can, on account of promises, pledges or enactments, compel a person to give evidence against himself. There is nothing from which it can be inferred that because the party may be exonerated from punishment that he may be compelled to give evidence against himself. The fact that he is not to be punished does not remove the fact that he has given evidence against himself. It is the *giving evidence* against himself under compulsion that is forbidden. . . . The sole foundation for the assumption that the witness may be compelled to answer is, that he is by his answer exempted from punishment, while the Constitution has no reference either directly or by implication to the punishment. This seems to me to be rather loose construction. It would be better to read the Constitution as we find it, and if it is defective leave to sovereignty, where the power belongs to change, alter or amend. Especially should this be so in a question that has been pronounced upon by such minds as McKinney and Nicholson, authors of the Constitution, contrary to the construction now insisted for.

"Judge McKinney was in the convention that framed the Constitution of 1834, which contains in its exact words, and by number of article and section the clause now before us. In 1859 he wrote his opinion in Hatfield's case, construing the statute now being considered, and used the language already attributed to him in reference to the Constitution made by himself. That opinion was the undisputed law of the land at the time of adoption of the Constitution of 1870, . . . art. 11, sec. 1. . . . The present law was in force and use and not inconsistent with the Constitution, nor has it expired, been altered or repealed. In all questions involving the meaning of statutes and the intention of the legislature, it is the duty of courts to construe and define that meaning, and when that is done the statute, as construed, is the law of the State. So that when the ordinance just cited was adopted, it made this statute, as construed by the court, the law, to be understood in the light of the decision. The convention is presumed to have known the law as construed, and to have so adopted it, and to have framed the article in question expressly with a view to the construction already given by the courts, when it transferred the language of the Constitution of 1834 to the Constitution of 1870, it as fully transferred the defined force and meaning of that language, and intended to do so." Judges COOPER and FREEMAN dissented. **81**, 60. *State v. Warner.* 1884.

Adverse Comment Upon Defendant's Failure to Testify, Error —When. —LURTON, J., held: "Adverse comment upon defendant's failure to testify in a criminal case, made by the State's attorney in his argument before the jury, constitutes reversible error, where the court fails, upon proper exception being taken thereto, to require counsel to desist from that course of argument, and to instruct the jury to disregard what had already been said." **89**, 231. *Staples v. The State.* 1890.

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ART. 1, SEC. 10. That no person shall, for the same offense, be twice put in jeopardy of life or limb.[1] [Same as Const., 1834, art. 1, sec. 10; Const., 1796, art. 11, sec. 10.]

Appeal By the State.

No Appeal for the State in a Criminal Case.—PER CURIAM: "It is a rule of the common law that no one shall be brought twice into jeopardy for one and the same offense. . . . Because of this rule it is that a new trial can not be granted in a criminal case where the defendant is acquitted. A writ of error will lie for the defendant, but not against him. This is a rule of such vital importance to the security of the citizen that it can not be impaired but by express words." 4, 111. [2]*The State v. Reynolds.* 1817.

Acquittal of Defendant—No Appeal by the State—Reasons Therefor—Deliverance by the Jury—Art. 1, Sec. 17—New Trial.—PECK, J.: "In the case of State *v.* Hitchcock, this point was raised before the court in 1829, and upon the record this memorandum is indorsed by PECK, J.: 'The court are unanimously of opinion that no appeal lies for the State

[1] For indirect or unimportant mention of this section, see 22, 71; 26, 509; 28, 677; 29, 431; 30, 602; 36, 552; 50, 579; 62, 321; 67, 57; 85, 342, 551.

[2] Citing several cases. This case seems to have been overlooked by both the attorneys and judges, while the case of State *v.* Solomons was under consideration.

from a verdict and judgment of acquittal on a State prosecution. The State, having established her jurisdiction and tried her experiment, should be content. To permit appeals might be the means of unnecessary vexation. The practice has been, as now determined—first in our former Superior court, and, second, in the Circuit courts—to dismiss such appeals coming from the County court. We will follow these determinations.' The case here cited had by appeal been taken from the County into the Circuit court, and there dismissed. It is now asked on what are these restrictions of the court founded? The Constitution provides that every person charged with an offense indictable shall have a speedy public trial by a jury, and that in certain cases of a serious character he shall not be twice put in jeopardy. . . . The legislature have fixed the tribunal having cognizance of the offense, and there is no [1]act giving the State an appeal in direct terms; it would be dangerous to allow so great a latitude of construction as to give it by implication. If the party has had a public trial by a jury, the Constitution has been complied with, and, after his acquittal, should become a shield for him as to that offense. But, again, it is asked, if no appeal is given to the State, what authority is there for allowing it to the prisoner? The first reply I would make to this enquiry is that he could have it by *certiorari*, which, before the framing of our Constitution, applied in such cases, and the Constitution only extended the remedy to civil cases. . . . By the *certiorari* he could not get a new trial, where justice had not been done, for the courts were open; and, for an injury done him in lands, goods, person, or reputation, he was entitled to redress without delay, and by due course of law. Bill of Rights, 17. If jeopardized in his person or rights, in any respect, by a judgment of a court contrary to law, he was not without his remedy.

"But the language of our Acts of Assembly allowing appeals are taken as being broad enough to cover the case where, upon a conviction on a prosecution, the defendant desires another trial. The language of our act is, if the party be dissatisfied by the judgment, sentence, or decree of any County court, etc. [1]Act of 1794, ch. 1, sec. 63. The term 'sentence' in this section may well be taken as sufficient to allow the defendant, in a prosecution, his appeal. There are other acts to the same effect. The term 'sentence' can not apply to the State where she has failed in her prosecution; so that the act can not be taken by its letter as giving an appeal to the State, if the Constitution opposed no barrier, which it is believed it does. There is no reason or justice in restricting the language of our acts to civil cases, because it is of more consequence to guard the person and character of a citizen than to guard his property. If, for the smallest sum in damages, he be allowed his appeal from the judgment against him for it, how much more reasonable is it to allow the appeal where, by a sentence, his person is likely to be

[1] T. & S., 5244; M. & V., 6085, et seq.

injured? A fair interpretation of our acts, in favor of the liberty and right the Constitution guarantees, may well be taken for a defendant; while, as the terms used do not apply to the State, she shall not be permitted to experiment in the tribunal she has created, and then harass a defendant before another by appeal. With the Constitution alone before us, it is questionable if express words in an Act of Assembly giving an appeal to the State would authorize it.

"There is still another ground more conclusive to show that an acquittal by the jury must be conclusive and irreversible. The plea of the prisoner is 'not guilty, and for his trial puts himself upon the country.' The oath of the jury is 'well and truly to try, and true deliverance make, between the people of the State and the accused whom they shall have in charge.' This is the proper form, as well in the higher offenses as in misdemeanors. 1 Chitty on Cr. Law, 551. Thus the accused submits his whole fate to his jury or country. When acquittal follows by the verdict, in the language of the law, there is a deliverance by the jury that the judge has no right to gainsay. The judge, on such a finding, can not grant a new trial. In England, a new trial can not, in general, be granted at the motion of the prosecutor; the only case put in the books where it may be allowed is where fraud has been practiced by keeping out of the way the witness for the Crown (1 Chit. Cr. Law, 660), or proceeding to trial without notice. Neither of these would be ground for a new trial in a criminal case in this country. The vigilance of the State guards against these accidents; and no case can be cited where such a ground has been laid for setting aside a verdict of acquittal. Indeed, the novelty of setting aside a verdict of acquittal in this country, and arraigning before a second jury, would give instant alarm; it must be seen that, if allowed, men would be harassed in the same prosecution by experiments to reach them, and it would beget a feeling of distrust and indignation toward the administration of the criminal law which would not be patiently borne." **14**, 360. *The State v. Solomons.* 1834.

Discharge of Jury.

In Event of Mistrial, Jury May Be Discharged — Constitution of United States — Its Relation to State Constitution.—Defendant moved to be discharged on the ground that the mistrial and discharge of the jury against his consent was equivalent to an acquittal. Demurrer filed and overruled an appeal taken by the attorney general. CRABB, J.: "Were this a new question, I should be unprepared to say, what I now feel it my duty to determine, in deference to irresistible authority. Great difficulty would be experienced by me in arriving at the conclusion, which has now generally obtained, as to the proper interpretation of the constitutional and common law provision, 'that no person shall, for the same offense, be twice put in jeopardy of life or limb.' According

to the common acceptation of the expression, an individual would certainly be put in jeopardy, or, in other words, in danger, when arraigned before the proper tribunal, placed upon his trial, and a jury actually sworn to pronounce upon his innocence or guilt. But for a long course of judicial opinion to the contrary, I should be at a loss to attach a different meaning to the expression, and might feel myself bound to hold that a second jury can not be empaneled to try a citizen for a felony after he has been once jeopardized or endangered by a submission of his cause to a competent court and a jury, upon a valid indictment. A fear that the power in question would sometimes be exercised for the purposes of oppression and persecution, would make me hesitate long before I could consent to abandon a construction, which would seem to be most consonant with the meaning of the words, and withal, most favorable to life and liberty. 1 Haywood's Rep. 241. I should not be prepared readily to submit to a different interpretation for anything to be found in the English books; although they clearly, and upon the authority of numerous precedents, sanction the discharge of a jury for sufficient cause, and the empaneling of a second one. The older English books and cases are all referred to and reviewed in the case of the two Kenlocks (Foster's Rep. 22); and the modern ones are attentively examined in some of the American books to be referred to below.

"The prevalent, the settled interpretation, in England, of the principle or provision before alluded to, now is, that a man shall not be put upon his trial a second time after he has been once tried by a competent court upon a valid indictment and acquitted. The acquittal, however, according to the most modern authorities, I take to include the case of an illegal discharge of the jury, in which case the defendant is virtually acquitted, and is entitled to be also discharged.

"In the United States I find a weight of coincident adjudication which I can not, I believe, with propriety resist. The Supreme court of Massachusetts, the Supreme court of New York, and above all, the Supreme court of the United States, fitted more than any other tribunal, from the necessary habits and researches of its members, to decide upon American constitutional law, have, without, so far as I can discover, a dissenting voice, all held that a court, in the exercise of a sound discretion, may discharge a jury even in a capital case, and that the defendant may be again tried. Commonwealth *v.* Boyden, 9 Mass. Rep., 494; People *v.* Olcott, 2 Johnson's Cases, 301; Same *v.* Goodwin, 18 John. Rep., 187; United States *v.* Perez, 9 Wheaton's Rep., 579.

"In Goodwin's case, Chief Justice Spencer, delivering the unanimous opinion of the court, says: 'That although the power of discharging a jury is a delicate and highly important trust, yet it does exist in cases of extreme and absolute necessity; and it may be exercised without operating as an acquittal of the defendant; it extends as well to felonies

as misdemeanors; and it exists and may be exercised in cases where the jury, from the length of time they have been considering a cause, and their inability to agree, may be fairly presumed as never likely to be overcome, unless compelled to do so from the pressing calls of famine or bodily exhaustion.' In Perez's case the Supreme court of the United States say: 'We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted nor acquitted, and may again be put upon his defense. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice otherwise would be defeated. They are to exercise a sound discretion on the subject, and it would be impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge,' etc.

"Cases may be supposed where a court would act very improperly in discharging a jury; several are to be found in the English books; and I concur entirely with the Supreme court of New York, in considering it as one instance of an abuse of the power, where a juror was withdrawn, because the public prosecutor was not prepared with his proofs. 18 John. Rep., 206; 2 Caine's Rep., 304.

"The presumption in this, as in all other cases, is that the judge performs his duty. If it clearly appears to this court, however, from a bill of exceptions taken at the time of discharging the jury, that the discretion of the judge was improperly exercised, the power and duty are devolved upon us of revising the proceedings of the inferior court; we must say that such discharge was tantamount to an acquittal, and and that under such circumstances a defendant should be discharged. In the case before us no exception was taken by the defendant; nor can we see anything authorizing us to conclude, that there was an illegal exercise of the conceded discretion. It is the opinion of the court that the judgment of the Circuit court, discharging the defendant at the subsequent term, on the mere ground of a discharge of the jury at a prior term, be reversed; and that the defendant enter into a recognizance for his appearance at the Circuit court, to be tried upon the issue joined."

CATRON, J.: "I have been myself relieved in this cause from much examination and labor, for the reason, that the question to be decided is not before the court for the first time, since I have been a member

thereof. It arose, and was a principal question in the State against Bob, a negro slave, heard at Sparta last term. Bob had been charged, under the Acts of Assembly, before justices of the peace for White county, with the murder of Hannah Shadam and her child; a jury was empaneled, and the proofs in the cause submitted to its examination, which jury disagreed; and, after a fair trial to come to a verdict, and a failure, a mistrial was ordered by the justices, contrary to the consent of the prisoner. It was then moved that he be discharged, which was also refused; the defendant was tried a second time and found guilty. The cause was brought to the Supreme court, at the August term, 1825, at which time the point did not arise, the court only ordering the Circuit court to issue a *certiorari* to bring the cause to that court, and proceed upon the same according to law.

"In that court it was moved, that the finding of the jury on the second trial, and the judgment of death thereon, be quashed, and the defendant discharged. The whole proceeding before the justices was quashed by the Circuit court, and the defendant indicted at common law, tried, found guilty, and sentenced; from which he took his writ of error to the Supreme court, where the cause was heard at August term, 1826. This court quashed the proceedings of the Circuit court, upon the common law indictment, as not having been warranted by our statutes, and then it was again moved that the defendant be discharged, because he had been once put in jeopardy, by the submission of his cause to the jury, which disagreed. The question was brought directly before the court, who did not doubt but that it was bound to discharge the defendant, although a slave, if the principle was without exception, that a mistrial was equivalent to an acquittal.

"Knowing the cause would come before the court at the term of 1826, the question was examined by me, through the whole range of British and American authorities, before the court came on. The principle that the defendant could not be put upon his trial a second time, after the first jury had been discharged upon disagreement, had generally, not to say uniformly, obtained in the Circuit courts in capital cases in this State, so far as they came within my knowledge. My opinions of the English common law, and the Constitutions of the United States and our own State, were on the side of the construction adopted by the Circuit courts; such was also the opinion of Judge Haywood, whose experience and learning upon the subject were great, and entitled to very high respect.

"After, however, giving the matter every consideration that its great importance entitled it to, Judge Haywood and myself were compelled to give way to the weight of the American authorities, cited by Judge Crabb, particularly to that of the Supreme court of the United States, in the case of Perez, where the clause of the Constitution of the United

States, 'that no man shall be twice put in jeopardy of life or limb, for the same offense,' received a construction, which, upon that instrument, is binding authority upon the State courts.

"That the provision in the Constitution of the United States is binding entirely upon all the State courts in the Union, and secures the privilege of not being twice put in jeopardy, to every citizen of every State, notwithstanding the State Constitution may have no such provision, can not be denied. It is the paramount law of every State, over the Constitution and laws of the States; and although our own Constitution has a similar provision, we did not feel ourselves warranted in giving it a construction different from that given to the Constitution of the United States, by the tribunal possessing the power (and of pre-eminent qualifications) to fix the construction of that instrument. We, therefore, followed that decision, and ordered the defendant to be again put upon his trial, before the justices who first submitted his cause to the jury which disagreed. Judge Whyte had been of the opinion, when the cause was first taken up in 1825, that the defendant could again be put upon his trial, notwithstanding the discharge of the former jury. Judge Haywood and myself concurred with him. Judge Peck was confined by sickness and absence from the court. I have no doubt that the discretion of discharging a jury, in a capital case, by the Circuit court, is the most delicate duty that court has to perform, and should be exercised with all possible caution; that its exercise is subject to the revision of this court; and that where the power shall be in any degree mistaken or abused, the defendant ought to be discharged. For as much as the cause of The State *v.* Bob is not reported, and if reported there are no reasons given in the opinion why it differs from the well-known propositions and arguments of counsel, of Judge Haywood and myself, upon the point decided, I have thought it necessary to say thus much in explanation. Judgment reversed." WHYTE, J., concurred. PECK, J., dissented. 8, 280. *The State v. Waterhouse.* 1827.

Discharge of Jury Against Consent of Prisoner — Grounds of Necessity.—TURLEY, J.: "The right of trial by jury has always been regarded by the English and American jurists as one of the most sacred principles of the law, one to which the citizen is more deeply indebted than to any other for that security to life, liberty, and property guaranteed in Great Britain and the United States to an extent unknown in other countries, and the preservation of which, in its purity and independence, has at all times been guarded with a most watchful and jealous eye. Therefore it is that an attempt, whenever made, by the courts to interfere with the privileges of a jury, and endanger their independence and the consequent security of the subject, has at all times been promptly resisted, and though occasionally, in times of great political excitement, in England, it may have succeeded for the day, yet, to the honor of the

legal profession, the usurpation has always been rebuked, and the proper balance of power between the court and the jury quickly restored. It is a well-understood maxim of our law that the judges are to expound the law, and the jury to ascertain the facts, neither of which has the power to interfere with the province of the other. The jury, in their deliberations upon the facts, are as independent of the court as the judge, in determining the law, is of the jury; and the consequence is that, when a case has been submitted to a jury, there it must remain until it has been decided by them, or is withdrawn from their consideration, not at the will and pleasure of the court, but under circumstances justified by the law.

"In the case now presented for the consideration of this court, the jury returned no verdict, and the case was taken from their consideration, and they discharged, against the consent of the prisoner. And the question is whether, under the circumstances, this was not an illegal exercise of power on the part of the court below, and the prisoner, of consequence, entitled to her discharge. This is a question of much importance, and although it has not, perhaps, been directly settled by adjudicated cases in this State, we feel much relieved in the conviction that it is well settled, both by principle and authority, in England, and a very respectable portion of the States of this Union. Lord Coke, in his 1 Institute, 227, b, and 3 Institute, 100, lays it down as a general rule that a jury sworn and charged by the court in cases affecting life or member can not be discharged by the court, or any other, but they ought to give their verdict. This doctrine, upon the authority of Coke, was afterwards engrafted by Hawkins and Blackstone into their elementary treatise on the criminal law. And although this principle was controverted in the case of Ferras, cited in Sir Thomas Raymond, 84, and in a case of larceny reported in 1 Ventress, 69, and one reported in Salkeld, 646, yet it can not be said to have been fully examined and completely overruled until the decision of the case of the two Kinlocks, reported in Foster, from page 22 to 40, when it was considered by all the judges but one that the general rule laid down by Lord Coke had no authority to warrant it, and could not be universally binding, but that there were exceptions to it, and in that case determined that the court had power to discharge a jury at the request of the prisoners, assisted by able counsel, and with the intent of imparting to them a privilege which they could not otherwise have enjoyed. Since that decision it has not been doubted that the courts have the power to discharge juries without their rendering a verdict, but only, as we think, in cases of manifest necessity. All the cases of exception (to the general rule as laid down by Lord Coke) specified in the elaborate opinion of Mr. Justice Foster, in the case of the Kinlocks, are cases of necessity, and there is no authority to be found in the English books which sustains the position that a jury

may be discharged in a criminal case without the consent of the prisoner, but from necessity. Such, also, we think, has been the train of the decisions in the United States."

After reviewing these decisions, Judge Turley continues: "This brings us to the examination of what constitutes this necessity. We are of opinion that the causes which create this necessity may be classed under three heads: First, where the court is compelled by law to be adjourned before the jury can agree upon a verdict; second, where the prisoner, by his own misconduct, places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the State, or is himself, by the visitation of Providence, prevented from being able to attend his trial; and third, where there is no possibility for the jury to agree upon and return a verdict.

"It is upon the last of these propositions that the question in the case under consideration arises. The jury were empaneled on Thursday evening, at 2 o'clock, and were discharged at 9 o'clock on Friday morning, because they could not agree upon a verdict, the court continuing its session until some time on the Saturday following. Now, the question is, was this such a case of necessity as justified the court in discharging the jury? A jury may not be able to agree upon a verdict for many reasons, such as sickness or insanity of one or more of the jurors, exhaustion of the jury before they have been able to come to a decision of the case, the absconding of one of the jurors without the consent of the court. These are cases put in the books, and with others of like character, constitute what we will distinguish as cases of physical impossibility. A jury may also not be able to agree because their minds can not come to the same conclusion from the facts submitted to their consideration. This, we would consider as a case of moral impossibility; and we are called upon to say whether it constitutes a necessity for the discharge of a jury before the time arrives when the court must adjourn. We think it does not. . . . There is no English decision, then, sustaining the position that the court has the power to discharge a jury because they can not agree upon a verdict, unless there be some physical impossibility connected with it, and so we think is the spirit of all the American authorities when properly understood."

Judge Turley then reviews the decisions of the U. S. Supreme court and of the courts of other States, and concludes: "Upon the whole, the power of discharging a jury, against the consent of the prisoner, is of such a dangerous character that we hesitate not in saying that it should not be exercised by the courts where the jury can not agree on a verdict, unless they be prevented by a physical impossibility from so doing, and that when such an impossibility does not exist the jury should be kept together until such time as the court is about to adjourn, when, of necessity, they must be discharged. This is the situation of the case

under consideration. There was no physical impossibility for the jury to agree, and they were discharged at least twenty-four hours before the court adjourned, which was an improper exercise of power on the part of the court, and the judgment must therefore be reversed and the prisoner discharged." **18**, 536. *Mahala v. The State.* 1837.

Discharge of Jury Without Objection—The Mahala Case Doubted.—McKINNEY, J., held: "Where a jury in a case of felony, being unable to agree upon a verdict, were discharged without objection of prisoner, whereupon the case was continued by consent, and at a subsequent term the prisoner was tried and convicted without exception to the discharge of said jury, he can not take advantage of such irregularity, if there be any, upon appeal to the Supreme court, but must be held to have waived it." With reference to the doctrine announced in the Mahala case Judge McKinney said: "Whether this doctrine is maintainable upon the weight of authority, or sound reason, is a question well worthy of consideration, when a proper occasion shall be presented. But the case before us does not necessarily demand a discussion of that question." **35**, 475. *Morgan v. The State.* 1856.

Challenge of Juror for Cause After the Prisoner Has Been Put Upon His Deliverance.—TURLEY, J.: "It is too late, after a jury has been sworn, to challenge any of its members *propter defectum*; and therefore, if the court permit the attorney general, not only after the jury has been sworn, but 'charged'—that is, after the prisoner has been placed in the hands of the jury for trial—to challenge ten of the jurors for cause, and set them aside against the prisoner's consent, and compel the prisoner to select ten others, who, in conjunction with the remaining two, returned a verdict against him, the prisoner is discharged." **20**, 253. *Ward v. The State.* 1839.

Jeopardy—What it Is—Right to Have the Jury Kept Together—Discretion of the Judge—Nolle Prosequi.—MILLIGAN, J.: "When, upon a valid indictment, the accused is regularly put upon his trial in a competent court, the jury elected and sworn and thereby becomes a part of the tribunal sitting for the prisoner's trial, and all the preliminary things are ready for the trial, he has then reached the jeopardy from the repetition of which our constitutional rule protects him. The jury is then charged with his deliverance; and his life, undoubtedly, in capital cases, is in jeopardy during their deliberations. It may be conceded, in cases of legal necessity, that the jury may be discharged, or a juror withdrawn, a mistrial or *nolle prosequi* entered, with or without the prisoner's consent; but, if there be anything short of such legal necessity, or the prisoner's assent, how can the court, without violating the constitutional provision, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy

a second time? The signification of the word 'jeopardy,' in its common use, is, 'exposure to death, loss, or injury, hazard, danger, peril;' and to restrict its meaning to a verdict actually given, is to impose upon it a limitation which the words 'twice in jeopardy,' do not mean. Whenever the jury is charged with the deliverance of the prisoner in a capital case, on a valid indictment, he is in jeopardy—in danger of life and limb; and the court can not, without sufficient cause, or the assent of the prisoner, discharge the jury, no matter how defective the proof may be, without entitling him, under the Constitution, to his discharge. 1 Wharton's American Cr. Law, 573 to 580; Bishop's Cr. Law, 2d ed., sec. 660, and authors cited; also, 2 Graham & Waterman on New Trials, 88 *et seq.* It may be, and we doubt not it is so, that less strictness in offenses punishable in the penitentiary, or by fine and imprisonment, is required, than in offenses punished capitally. In such cases, the judge undoubtedly has a larger discretion, and may exercise it in necessary cases, for the accomplishment of the ends of justice." **45**, 317. *The State v. Conner.* 1868.

Consent of Prisoner—Acts From Which This Will Be Inferred.—HAWKINS, J., held: "If a verdict is so defective that a judgment can not be rendered upon it, and the accused fail to have it corrected, or to object to the jury being discharged, or to their verdict, in such a case the law will infer that he consented thereto, and thereby waived his objection to being again put upon trial as in case of a mistrial." **47**, 516. *Murphy v. The State.* 1870.

Discharge of Jury in Absence of Accused.—TURLEY, J., held: "The rule that no one shall be twice put in jeopardy for the same offense does not obtain in cases where the verdict of guilty was returned and the jury discharged in the absence of the accused. A new trial should be granted in such case." **70**, 156. *The State v. Hayes.* 1879.

Origin of This Provision—Jury May Be Discharged When Judge is Satisfied of Impossibility of Agreement.—TURNEY, J., held: "A jury in a criminal cause may be discharged by the court without the consent of the accused, where they have had a sufficient length of time to deliberately, carefully and fully consider the entire case as presented by its facts and as governed by the rules of law given in charge by the court, and there is no possibility of an agreement upon and return of a verdict, but the court should be satisfied of the impossibility of an agreement, and the reasons for such conclusion by the court should be set out in its order of discharge so that a revising court may consider them upon a plea of 'once in jeopardy.' . . . The origin of the constitutional provision was the desire to keep out of our institutions a practice that had at one time grown up in England of trying offenders, or persons so accused, as often as might please those who chose to prosecute, without

regard to former trials, verdicts and judgments, and was, as I think, meant to control in cases where a trial had once been had and a verdict rendered, or even prevented by fraud on, or improper interference with, the rights of the accused." **72**, 363. *The State v. Pool.* 1880.

Unsigned Minutes Showing Discharge of Jury Sufficient Evidence—When.—FREEMAN, J., held: "An entry made by a clerk, but never signed by the presiding judge, by reason of his sickness and death, showing the discharge of a jury in a capital case by consent of the prisoner, is sufficient evidence of the fact of discharge by consent." SNEED, J., dissented. **50**, 493. *Pat Moore v. The State.* 1872.

Former Acquittal and Conviction—Indictment—Different Grades of Offense—Practice.

Former Acquittal—Quashing Indictment—Second Indictment.—CARUTHERS, J.: "It seems that a jury was sworn to try the defendant for the same offense upon another indictment, and it appearing that the same was defective for the want of a prosecutor, and perhaps in other respects, the same was quashed upon motion of defendant's counsel, and the jury discharged. The present indictment was then found. The discharge of the jury, in the first case, resulted from the successful motion of defendant to quash the indictment under which he had then been put upon his trial. He was never in jeopardy on that charge, as it was not good in law, but liable to be quashed at any time." **34**, 290. *Pritchett v. The State.* 1854.

Escape of Defendant After Conviction—Second Trial—Order of Court.—The prisoner, Andrews, was present in court until the jury retired to consider their verdict, when he *escaped from custody.* The jury rendered a verdict of guilty, and judgment was pronounced. The prisoner was again arrested, and judgment was suspended. At March term, 1855, the prisoner being again in custody before the court, his counsel moved that said verdict and judgment rendered at a former term be set aside, which was done. The prisoner was again put on his trial, which resulted in his conviction, from which he appealed in error. TOTTEN, J.: "It is now insisted that it was error to put the prisoner a second time on his trial, while the former conviction remained unrevoked and in force; that the judge had no power to revoke and annul a conviction had at a former term of the court, and that his action in this respect was *merely void.* The general rule is that the court has no power over its final orders and judgments rendered at a former term. The matter in judgment is concluded in that forum, and the record has become permanent and inviolable, unless the same be reversed or annulled by the action of a court of revisory jurisdiction over the subject. But the rule has relation to orders and judgments which the

court at the former term had power to make, and which are not in themselves *merely void.* A void order or judgment is of no effect or consequence, and nothing can be predicated of it. No action is required to revoke it; it is null in itself. . . . The order made to set aside the verdict and judgment rendered at a former term was void, for the want of power in the court to make such order." 34, 351. *Andrews v. The State.* 1855.

Small Offense Law — Former Conviction Before a Justice of the Peace in Felony Case.—NICHOLSON, J., held: "A plea of former conviction before a justice of the peace, under the small offense law, is not a good bar to an indictment for felonious assault." NELSON, J., dissented. 50, 321. [1]*Mikels v. The State.* 1871.

Acquittal on One Count — Conviction on Another — New Trial.—GREEN, J., held: "Where a defendant has been convicted on one count of an indictment, and acquitted on the other counts, a motion by him for a new trial can not be understood as going further than to the count on which he was found guilty, and it is error in the court, in such a case, to set aside the whole verdict; and if, on a new trial, the prisoner is acquitted on the count on which he had been convicted on the former trial, and convicted on one of the counts on which he had been acquitted, it was error to render judgment on the conviction, and the defendant must be discharged." 17, 334. *Campbell v. The State.* 1836.

Assault — Battery— One Offense.—TOTTEN, J., held: "If a party be charged with an assault, and convicted thereof, he can not afterwards be punished for the battery committed at the same time." 32, 494. *The State v. Chaffin.* 1852.

Two Counts — Acquittal on One, and Second Trial on Both.—HARRIS, J.: "The error assigned is that the prisoner was tried upon both counts in the indictment, when he had been previously acquitted on the second count. There is no error in this. The jury were expressly instructed that no conviction was sought upon the second count, and their verdict is that they find the defendant guilty of an 'assault with intent to commit a rape upon Mirah Looper, in manner and form as charged in the indictment.' The first count is the only count in the indictment that charges him with an assault with intent to commit a rape; therefore, this is clearly a finding upon the first count, and upon that count he never had been acquitted. The case of Campbell *v.* The State, 9 Yerg., 333, relied on by the plaintiff in error, is wholly different from the case before the court. In that case the defendant was convicted on a count upon which he had previously been acquitted, and for

[1] Overruling Hodges *v.* The State, 45, 7.

that reason the judgment was properly arrested. We have seen, however, that such is not the case."[1] **36**, 608. *Major v. The State.* 1857.

Accessory Before the Fact.—COOKE, J., held: "An acquittal under an indictment charging murder, is not a sufficient plea to a subsequent indictment for the offense of being accessory before the fact." **82**, 475. *Morrow et al. v. The State.* 1884.

Nolle Prosequi Entered Where Indictment is Bad is No Acquittal.—CARUTHERS, J.: "It would seem to be a very strange incongruity in the law, to hold that a *nolle prosequi* after the case was submitted to a jury upon a bad indictment would operate as an acquittal of the prisoner upon the ground that he had been in jeopardy, in the sense of the Constitution, but that such would not be the effect of a trial and conviction when the judgment was reversed for the same or any other case. It would seem that the jeopardy was more imminent in the latter case than the former, by many degrees. Bishop, at the close of section 663, says that, although there is no direct adjudication on that point, yet he thinks it clear that 'if, on coming in of the verdict, the prosecuting officer discovers a defect in the indictment, he may, instead of moving for sentence, enter a *nolle prosequi* and indict anew.' Whether we would go so far, or in what other cases than the one under consideration we would hold that a *nolle prosequi*, after the traverse jury was elected and sworn, should entitle the prisoner to his discharge, need not now be determined, as it is safest to leave other cases to be considered on their own facts, as they may arise. It is enough for this case to hold, as we do, that a *nolle prosequi* entered with the assent of the court, even after the jury is empaneled and proof heard, where the indictment is bad, does not operate as an acquittal, as there was no legal jeopardy." **35**, 690. *Walton v. The State.* 1856.

Dismissal of Indictment—Discharge—Second Indictment.—NELSON, J.: "The plea in this case, shows that, after the judgment was reversed and the cause remanded, the indictment, together with all the proceedings against the defendant, was dismissed, and so the former conviction resulted in nothing. A trial upon the present indictment will not, therefore, put the defendant twice in jeopardy, within the meaning of the Constitution. . . . The provision in the Code, 5211, has no application to this case, as no statute has been passed to make the former indictment good."[2] **50**, 67. *The State v. Thurston.* 1870.

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[1] There can be no doubt that a former acquittal or conviction must be for the same identical offenses, but it is not necessary that all the particulars charged in either indictment should be the same. Meigs' Digest, vol. 2, p. 905, citing, **50**, 85; **17**, 376 and 335; **25**, 414; **31**, 14; **10**, 27; and other cases.

[2] M. & V., 6041, et seq.

When Trial is Without Plea, New Trial May be Ordered—Conviction.—DEADERICK, J., held: "Where there is a trial without a plea of not guilty, the court may, on the motion of the prisoner to arrest the judgment, set aside the verdict and order a new trial. In such case the record will not support a plea of former conviction." 50, 252. *Link v. The State.* 1871.

Offenses Against Federal and Municipal Governments.

Offenses Against State and Federal Governments.—HAWKINS, J., held: "A prisoner may be subjected to different, and a double punishment, for the same act making two different offenses. The same act making two different offenses, when it is in violation of the laws of a State, and also of the laws of the United States; and the subjecting the party to a double punishment for the same act, when he is guilty of two offenses, can not be held to be in violation of the Constitution of the United States, by placing the party twice in jeopardy for the same offense." 44, 146. *The State v. Rankin.* 1867.

Municipal Corporations — Nature, Origin and Growth in England and America — Objects — Benefits — Offenses Punished By Corporations May Be Punished By State Also.—FREEMAN, J.: "The question presented for our decision is, whether, where a party has been convicted and punished for keeping a gaming house by the municipal authorities of a town or city, this fact is a bar to the prosecution for the same offense by the State.

"We may remark, that art. 5 of Amendments to Constitution of the United States, providing, among other things, that 'no person shall be subject for the same offense to be twice put in jeopardy of life or limb,' has no application to the States, being only a limitation on the Federal Government. 7 Peters, 243; 7 Wall, 326, and cases there cited. Our own Constitution, art. 1, sec. 10, is, that 'no person shall for the same offense be twice put in jeopardy of life or limb,' the language being identical with that of the Constitution of the United States. Whether this clause, or the same provision in the Constitution of the United States, applies to offenses, the punishment of which does not extend to 'life or limb,' or to crimes as distinguished from misdemeanors, and was not intended originally to give the high sanction of a constitutional guaranty against the repetition of the prosecution only in such cases, we need not decide at present. That this is the literal meaning of the language is pretty clear, and it was certainly understood to apply only to offenses punished by loss of life or limb, by our earlier judges on this bench, as held in the case of The State *v.* Reynolds. . . .

"In endeavoring to arrive at a proper conclusion on this question, we must remember, according to the idea of Judge Cooley, in the case of The People *v.* Harlburt, 24 Mich. R., 96, that the Constitution of our State assumed the existence of counties and municipal corporations, the

latter having and exercising such powers of local self-government under grants in charters from the legislature as might be necessary for their proper regulation, and the maintenance of the peace, good order and protection of the people thus aggregated in large masses. That the existence of such municipal corporations being assumed and recognized in the Constitution, as part of the arrangements contemplated to make up the machinery of the great corporate body, the State, it must be fairly understood that the people or convention contemplated that these corporations should have and exercise all the usual powers proper and necessary for the perpetuation of their existence, and for the due regulation of their peculiar life, so to speak. We therefore conclude, that whatever may have been the usual powers granted or ordinarily held by these corporate bodies at the organization of our government, and whatever powers necessary and proper to be exercised by them, as an incident to their existence, as part of the machinery of the government of the State were expected to be continued to them, under legislative grants in their charters, and this by the very fact of the clear recognition of the fact, that such bodies should exist in the Constitution of our State. . . .

"As a matter of history, we know that the organization of municipal corporations was one of the most efficient agencies by which freedom and government by law, rather than strong hand, was introduced and fostered in Europe in the Middle Ages. Robinson, in his view of the progress of society in Europe, Introduction to History of Charles V, p. 19, in referring to the institutions which had tended to secure the liberty and independence of the people, says: 'The forming of cities into communities, corporations or bodies politic, and granting them privileges of municipal jurisdiction, contributed more, perhaps, than any other cause to introduce regular government, police and arts, and diffuse them over Europe,' than any one of the various causes which he enumerates in his essay, as contributing to these desirable ends. In enumerating the powers which were thus obtained by these chartered committees, among other important rights, the same author says: 'They were recognized as bodies politic to be governed by a council and magistrates of their own nomination. These magistrates had the right of administering justice within their own precincts, of levying taxes, in embodying and training to arms the militia of the town, which were officered by men appointed by the municipal authorities. These institutions originating in this form in Italy in the Twelfth Century, adopted in France soon after, were in no great length of time transferred to England, the country from whence we derive our jurisprudence. There, it is true, modified in some of their aspects to meet the wants of a great people, and being gradually, to a greater or less extent, subordinated to the general control of the supreme legislative body, the Parliament, yet still

maintaining many of their chartered rights as inviolable, and clinging to them as essential to their freedom and even their existence, as one of the subordinate political divisions of the State, continued up to the time of the separation of the Colonies from that country.

"In this form we received this institution, and our political fabric has been reared, so to speak, with the municipal corporation as one of its integral elements, forming, as we may readily see, one of the necessary parts of the social and political organization under which we live, without which the government of the State would be incomplete, and utterly fail to attain one of its great ends, the protection and security of person and property in towns and cities, as well as throughout its entire territory. With this history of these institutions, and in view of the necessity of having such bodies, from the organization of the government down to the present time, acts of incorporation have been granted to our cities and towns, granting them such powers as were deemed proper for the attainment of the ends of their creation. . . . That the offense of keeping a gaming house is one that may and does present many elements of criminality in a city or town, by debauching the morals of the youth, presenting temptations to all inclined to yield to them, calculated to lead them into the ways of vice and crime, and that these evil influences are far more active and powerful in towns and cities than in the country, therefore productive of a wider spread injury, and one specifically affecting the interest and good morals of the incorporated community, will be readily admitted by all. It is, therefore, highly proper that this aggravated nuisance should be subject to the control of and restraints imposed by the ordinances of these local governments peculiarly affected by the evil.

"We therefore conclude, that in view of the facts and necessities of the case, it can not be understood that by the common law of any civilized country of the present day, deriving its jurisprudence from English source—that the rule forbidding a party to be punished twice for the same offense—was intended to include, and be held to apply to the case of punishment by these corporate authorities, for the wrong done them and their peace, security, and morals, so as to be a bar to a prosecution on the part of the State, and infliction of such punishment as she may deem proper to inflict by law upon her citizens. The fact that he is both a citizen of the State and also of a corporation, and is therefore amenable to both jurisdictions for any violations of the law of either, and that each may choose to forbid an act, and inflict a penalty for its violation, ought not, we think, make any difference. He can readily avoid such inflictions by obedience to the laws of the community of which he is a member, and if he chooses to defy constituted authority, courts organized, not only for the punishment but suppression of crime,

as far as they may be able, should feel but little sympathy with such offenders." Tenn. Leg. Rep., vol. 3, p. 177. [1]*Greenwood v. The State.* 1873.

ART. 1, SEC. 11. That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore, no *ex post facto* law shall be made[2]. [Same as Const. 1834, art. 1, sec. 11; Const. 1796, art. 11, sec. 11.]

ART. 1, SEC. 12. That no conviction shall work corruption of blood or forfeiture of estate. The estate of such persons as shall destroy their own lives shall descend or vest as in case of natural death. If any person be killed by casualty, there shall be no forfeiture in consequence thereof. [Same as Const. 1834, art. 1, sec. 12; Const. 1796, art. 11, sec. 12.]

ART. 1, SEC. 13. That no person arrested and confined in jail shall be treated with unnecessary rigor. [Same as Const. 1834, art. 1, sec. 13; Const. 1796, art. 11, sec. 13.]

PRESENTMENT—INDICTMENT—IMPEACHMENT.

ART. 1, SEC. 14. That no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment[3]. [Same as Const. 1834, art. 1, sec. 14; Const. 1796, art. 11, sec. 14.]

Forms Long Established—Caption of Indictment.—CRABB, J.: "The forms long established become the law, and ought not to be departed from, even in civil proceedings where left to the court alone. The legislature may dispense with them, it is true, except where the Constitution forbids it, and when done it should be by express provision, not by an inference deducible from an act of the legislature; and this remark should apply in an especial manner to criminal proceedings. This idea gains strength from the provisions of the Constitution, copied from Magna Charta, that 'no freeman shall be put to answer any criminal charge, but by presentment, indictment, or impeachment,' and that 'his trial shall be by an impartial jury of the county or district in which the crime shall have been committed.' How these provisions have been understood in that country, where, though liberty is regarded, yet not in a higher degree than with us, will be seen by the rules established and adhered to, from antiquity down to the present time, as well in times of heat, when the crown seemed to demand vengeance, as when

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[1] See **65**, 567.

[2] See Townsend *v.* Townsend, art. 1, sec. 20; Bell *v.* Perkins, art. 1, sec. 20; Jones *v.* Jones, art. 1, sec. 20.

For indirect or unimportant reference to this section, see **6**, 213; **10**, 272; **11**, 354; **22**, 479; **49**, 264.

[3] See McGinnis *v.* The State, art. 1, sec. 6, p. 7; Fields *v.* The State, art. 1, sec. 8, p. 29; also, **80**, 133.]

The offense of mismarking and misbranding domestic animals, which, by the Act of 1741, ch. 8, sec. 1, was punishable by a single magistrate on the first conviction, with a pecuniary fine; and on the second, with stripes, was abolished by this provision. **23**, 1. *Williams v. Karnes.* 1843. *Meigs' Digest*, p. 903.

no fervor excited prosecutions. Our policy, so far from discarding the principle, has embraced it in every case where it has been presented and pressed to the court. One reason obviously is, that often the duty is limited and expired." PECK, J., dissented. 8, 164. *Cornwell v. The State.* 1827.

ART. 1, SEC. 15. That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion, the general assembly shall declare the public safety requires it[1]. [Same as Const. 1834, art. 1, sec. 15. In Const. 1796, art. 11, sec. 15, after the word "invasion," follow the words, "public safety may require it."]

FINES AND PUNISHMENTS.

ART. 1, SEC. 16. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[2] [Same as Const. 1834, art. 1, sec. 16; Const. 1796, art. 11, sec. 16.]

Protection of Homes—Act Imposing Penalties on Persons for Prowling and Going in Disguise Does Not Provide Cruel and Unusual Punishment. —The defendant was convicted for feloniously prowling and traveling in disguise. FREEMAN, J.: "It is urged that the penalties imposed by this [3]Act of Legislature, under which defendant stands indicted, are obnoxious to the . . . Bill of Rights. . . . We may say, the punishment here is neither cruel nor unusual. 'Fine and imprisonment in the county jail' for the misdemeanor, and for the felony, in the second section, 'imprisonment in the penitentiary for a long period, ten to twenty years,' but this is neither cruel nor unusual, in the sense of the Constitution. When we look at the evils intended to be checked, and offenses forbidden by this act, and turn to the proof in this case, and see the character of acts shown to have been committed by some one, we feel no hesitancy in saying that whenever parties shall be regularly convicted after a fair and impartial trial, in accordance with the forms of law, of such offenses, we shall feel no hesitancy in enforcing sternly the penalties provided by the statute. Every home in this State is entitled to be protected from intrusion and outrage, whether it be the mansion of the wealthy or the hovel of the poorest man in the land. It should be the pride and boast of every citizen to make the law so effective in its protective power that we may be able to say of our country, as Canning said of the peasant homes of England, 'that the winds and rains may enter them, but, without the warrant of the law, the king dare not do it.'

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[1] See McLendon *v.* The State, art. 6, sec. 12; also, 5, 167; 35, 413 and 700; Acts of 1887, ch. 157; Shannon's Sup. to M. & V., p. 270.

[2] See France *v.* The State, art. 6, sec. 14; also 81, 8.

[3] T. & S., 4770a; M. & V., 5560.

We can only attain this desirable end by punishing promptly and severely all who shall dare, in violation of law, to intrude upon the sanctities of that place in which no forbidden or uninvited foot should ever be permitted to tread." 50, 164. [1]*Ligan v. The State.* 1871.

When Could Courts Interpose?—McFarland, J.: "At what point courts could interpose their opinion as to the degree of punishment proper to be inflicted, and overrule the action of the legislature in upholding this provision of the Constitution, would be a difficult and delicate question. Whether the courts have the power to annul the acts of the legislature on this ground, or whether the provision is simply directed to the legislature to govern them in the passage of laws, and to the courts in inflicting punishment in cases where the punishment is within the discretion of the courts, we need not now determine. We are aware of no construction of this clause by our courts." 68, 587. [2]*The State v. Lassater.* 1877.

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[1] See same case, art. 6, sec. 11.

[2] See same case, art. 2, sec. 17.

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ART. 1, SEC. 17. That all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the legislature may by law direct[1]. [Same as Const. 1834, art. 1, sec. 17. In Const. 1796, art. 11, sec. 17, after the last word "direct," follows, "Provided, the right of bringing suit be limited to the citizens of this State."]

Statutes Affecting Litigation and Practice.

No Suspension of Execution by Legislature—"Right, Justice," Etc., Construed—Fixing Terms of Court—Duty of Courts.—The Act of 1819, ch. 19, sec. 1, directed that "no execution shall issue upon a judgment until two years after its rendition, unless the plaintiff shall endorse upon the execution that the sheriff may receive in satisfaction, the notes of certain banks." In passing upon the constitutionality of this act, HAYWOOD, J., said: "This clause relates to every possible injury which a man may sustain, and which affects him in respect to his real or personal property, or in respect to his person or reputation, and includes the right which is vested in him to demand the execution of a contract; which being a personal right to a chattel is, when performance is denied or withheld, an injury to him in his goods or chattels. And with

[1] For indirect or unimportant references to this section, see **26**, 115; **61**, 471; **87**, 734; **93**, 446, 451; Tenn. Leg. Rep., vol. 2, p. 9. For mention of suits against the State, see Tenn. Leg. Rep., vol. 1, p. 370; also, **40**, 115, 443. Concerning due course of law, see dictum of Chancellor East in **61**, 125.

respect to it right and justice is to be done, without sale, denial, or delay. In Magna Charta this restriction is upon royal power; in our country it is upon legislative and all other power. We must understand the meaning to be that, notwithstanding any act of the legislature to the contrary, every man shall have 'right and justice' in all cases, 'without sale, denial, or delay.'

"In 1796, when the Constitution was formed, it could not have been apprehended that any other department of government, except that of the legislature, would ever have weight enough to offer any obstruction. Experience from 1777 had fully demonstrated the imbecility of every executive office in the United States. From the executive no such offer could be anticipated. In 2d Institute, 55, my Lord Coke says the king is the speaker, and, in contemplation of law, is constantly present in all his courts, pronouncing the words of Magna Charta, '*Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum.*' In Tennessee every legislature is in contemplation of law during the whole session, and the judge of every court during the whole term, in the constant repetition of the words, 'right and justice' must be 'administered without sale, denial, or delay.' In 2d Institute, 56, justice is said to be the end, and right the mean whereby we may attain the end, and that is the law. What that mean consists in is more specially explained in Sullivan, 523, where it is stated to be original and judicial process. Original process, he says, must issue without price except that which the law fixes, and without denial, though the defendant be a favorite of the king or government who interferes in his behalf, and must be proceeded on by the judges, after suit instituted upon it, without delay, themselves or by order of the king, or, as we say, act of the legislature. And the judges, where the causes depend, must issue the proper judicial process, without fee or reward, except that fixed by law. In other words, where judgment is rendered, the judges shall cause execution to issue, notwithstanding any order or Act of Assembly or other pretended authority whatsoever. This is the long-fixed, well-known meaning and legal construction of the words right and justice, without sale, denial, or delay. They clearly comprehend the case of executions suspended by Act of the Legislature in every instance where justice requires that it should immediately issue; as it manifestly does where the law, operating upon the contract when first made, held out to the creditor the promise of immediate execution after judgment. . . . Suspension of execution as directed by the acts now under consideration is forbidden . . . by the declaration that justice and right shall be done without delay in all cases, the process of execution being one sense of the term right, which is not to be delayed.

"We are, therefore, bound to say that these acts are repugnant to the Constitution and void, so far as relates to the suspension of execu-

tion; and that execution ought to issue immediately without any such indorsement as the act requires. The judicial tribunals of the country must refuse sanction to acts which are to be executed through their agency; such as an act of suspension of execution is, which can not take place without the assent of the court. There are some violations which need not their instrumentality, and of course can not meet their rejection, and which alone the great body of the people must correct. An occlusion of the courts of justice would be one of them. The courts can not sit but on the days appointed by the legislature; and in that and other instances the court having no agency, would have no responsibility. Wherever their co-operation is unconstitutionally required, it is the most sacred of all their duties to withhold it, and whenever they are found to want firmness to do so, the Constitution and public freedom die together.

"And here it is convenient to obviate an argument of frequent recurrence. The assembly, it is said, have a right to suspend execution, because they may place the terms of the court at such a distance from each other as to make it impossible for a creditor to entitle himself to execution in less than two, three, or more years, at the pleasure of the legislature. The assembly has power thus to fix the terms of the courts, and a suspension of execution would be one of the consequences. The power to fix the terms, however, was not granted with a view to such consequence, but to the more easy and convenient administration of justice, consistently with the spirit of the Constitution, displayed in the section which requires that the courts shall be always open for the redress of injuries. To fix the terms at a remote distance from each other for the purpose of producing an effect adverse to the spirit of the Constitution would be to use the power of the legislature for purposes not intended in the grant of it to them. It would be an abuse of power, as much so as the suspension of the courts themselves; and certainly the legitimacy of an end produced can not be established by deducing it from an abuse of power; an abuse so alarming and so odious in its exercise that it never has been resorted to, and perhaps never will be, by the legislature, unless when the calamity to be evaded shall, in the opinion and by the consent of all mankind, be more disastrous and afflicting than the means adopted for its prevention. The indignant disapprobation of the people is a corrective so powerful that it need not be aided by any auxiliary power in any co-ordinate branch of the government, but may be safely left, as the people have left it, to its own inherent energies. Whenever the people shall be ready to approve of such a measure, the adoption of it may be safely committed to the uncontrolled discretion of the legislature. The power of the legislature will then fairly flow in the channels which the contested argument opens for them, and not as at present, through others which the argument

does not pretend is open to them. The contested argument is unsound unless an illegitimate end, produced by a misapplication of power, can sanctify the like end produced by a direct infraction of the restriction imposed upon that power." 7, 14. [1]*Townsend v. Townsend et al.* 1821.

Additional Security for Costs — Statutes — Ancient and Modern Rules of Construction.—WHYTE, J.: "The question intended by the counsel to be submitted to the court upon record is, whether, when a plaintiff has once given bond with sufficient security for the prosecution of his suit at the commencement thereof, pursuant to the Act of 1787, ch. 19, he can afterwards, upon the insolvency of that security, his removal out of the State, or the loss of the prosecution bond, or upon the failure of the security by any other means, not caused by the default of the plaintiff during the pendency of the suit, upon the happening of the contingency of failure, etc., be lawfully ruled by the court to give new and other security. . . .

"The true construction of the act must be derived from its words and spirit. The words of the act give no such power. A particular case of grievance and inconvenience in conducting law proceedings is stated by the preamble, for which the enacting clause applies the remedy; not in general terms laying down the principle guiding the relief, and leaving the case as they may or may not come within the purview of the act, but a specific remedy is given, single, certain, and definite in its nature, admitting of no latitude of construction in making the application, and seemingly incapable of being misunderstood. Such is the letter of the act; and by what rule of construction can it be extended beyond the specific remedy, and be said that its spirit is not expressed by the letter? Statutes are framed in modern times very differently from what they anciently were; they are now considered as plainly expressive of the whole will of the legislature on the subject, and what is not stated in the statute is not intended by the law-makers. In the present case, the act introducing an alteration in the common law must be construed as prescribing the extent of the alteration; and the legislature, having the whole matter before them, have said, 'Thus far we will go, and no farther.' After the provision of this act has been complied with by the plaintiff in giving a prosecution bond with security before the issuing of the writ, it is wholly gratuitous to say that the courts have the power to add other provisions to it, and make other and further alterations in the common law.

"The assumption of such a power by the courts, as is contended for by the counsel of the defendant in error, is not only unwarranted by the rules laid down in the books for the construction of statutes, but is repugnant to the spirit of the common law, Magna Charta, and our own

[1] See same case, art. 1, sec. 8, p. 45; art. 1, sec. 20.

Constitution. . . . Can it be said in these causes, or even in any case, that dismissing a plaintiff's cause from court upon the casualty of the failure of the security given pursuant to the [1]Act of 1787, ch. 19, because he is unable to give security a second time for costs, that he enjoys the protection and benefits secured to him by the Constitution? . . . It is believed it can not be so said." 8, 243. *Jones v. Kearns.* 1827.

Origin of This Provision—Reasons for It—Not a Collection of Unmeaning Epithets—Co-ordinate Branches of State Government—Partial Legislation—Retrospective Laws—Act Directing Certain Suits in Chancery to be Dismissed, Void.—Certain slaves having been emancipated by the will of their master, in July, 1827, Dabbs, administrator, with the will annexed, refused to file a petition in the County court to procure their emancipation, upon the ground that he was unwilling to sign the bonds required by law. The legislature, in 1829, passed an act allowing slaves thus emancipated to file a bill in equity, to obtain the assent of the State, where the executor refused to file a petition in the County court to procure such assent under the previously existing laws; a bill was filed accordingly, and the cause prepared for a hearing, when the legislature, in 1831, passed another act declaring that the Act of 1829 should not be construed so as to extend to any cause existing before its passage, and that in all such cases where bills were pending under the Act of 1829, the same should be stricken from the docket. After the passage of the Act of 1831, counsel for Fisher moved the court to strike the cause from the docket, pursuant to its provisions. This, the chancellor, Reese, refused to do. The causes were afterward tried by Chancellor Cook, who refused to emancipate any of the slaves except one. The bill was therefore dismissed as to the residue, from which decree an appeal was had to the Supreme court. All of the judges concurred in the opinion of Chancellor Reese, that the Act of 1831 was unconstitutional, and made his opinion a part of theirs, Judge Catron speaking for the court. Chancellor Reese, in deciding the case, said:

"It is for the legislature to pass the law, and for the court to expound it. They did pass the Law of 1829, and the court here present is of opinion that a proper construction of that act, as applied to the facts of this case, gives to the court cognizance of the cause. They took cognizance accordingly, and now we are informed by the Act of 1831 that the former act ought not to be so construed, and should be construed as in nowise to apply to a case like this. I need not argue to show how little authoritative a conclusion a legislative exposition of a former act should be considered. The counsel for the motion are under-

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[1]Act of 1787, ch. 19, sec. 1; H. & C., vol. 1, p. 271; Code 1858, 3187; T. & S., 3187; M. & V., 3907. This decision caused the passage of the Act of 1829, ch. 33, sec. 2, by which additional security may be required. See H. & C., vol. 1, p. 304; Code 1858, 3191; T. & S., 3191; M. & V., 3911.

stood to concede that legislative expositions are not to be relied on, and that the exposition in question is not well founded. Here, then, is a case where a right deemed valuable, and a proper subject for litigation—the right to freedom under a will—is brought into this court in pursuance of the law, and the matter proper for the investigation of this court is pending; the facts and circumstances which fix the rights of the parties and give the jurisdiction of the court are past, or already exist, when a simple legislative mandate comes to us and says such a cause shall not be tried—shall be stricken from the docket. This is the whole of the matter; for, if the legislative exposition of the Act of 1829 goes for nothing, there is nothing left but the simple, naked, direct mandate of the legislature to strike the cause from the docket, for the balance of the law is a mere direction to the clerk. Shall this court, can this court, obey the mandate? If it may in this cause, it may in any; it may in all. Shall the rights of all the parties in this cause to that relief and to that remedy, by due course of law, which their case calls for be disregarded, and this court be closed against them? For the efficacy of the Act of 1831, and the duty of this court with regard to it, can not depend upon the fact that a motion has been made to give it effect. If that motion could succeed, the duty of the court would have been the same if all the parties had been not only willing but anxious to proceed in this court. . . .

"This declaration, copied from the great charter, is not a collection of unmeaning epithets. In England, the reason of riveting this barrier around the rights of the subject was well understood. Their sovereign was wont to interfere in the administration of justice; 'a remedy by due course of law' was often refused, under the mandate of men in power, and the injured man denied justice; they were ordered sometimes not to proceed with particular causes, and justice was delayed; and the obtainment of their rights was often burdened with improper conditions and sacrifices, and justice was sold. So anxious were they to stop this enormous evil that a part of the official oath of a judge was that he would proceed to do right and justice, notwithstanding any letter or order to him to the contrary. This clause of Magna Charta, why is it inserted in our Bill of Rights? Was it from apprehensions of our executive? We had left him no power. Whatever power is considered as properly belonging to the executive department elsewhere is, by our institutions, conferred upon the legislature. It is the more important, therefore, and so the framers of our Constitution decreed that the judicial department should be independent and co-ordinate, and that the legislature should have no judicial power. Danger might justly be apprehended from this quarter. 'The judicial power (the whole of it) shall be vested in such superior and inferior courts of law and equity,' etc. If the legislature, possessing a large share of executive power,

be permitted to exercise judicial power also, or control the action of the judges within their peculiar sphere, the liberty of the citizens, under the government of good legislators, would be in imminent peril, and under bad ones would be entirely destroyed.

"The duties and powers growing out of the relations between the legislature and the judicial department, and the lines of demarcation between them, have been the subject of earnest and elaborate discussion in the courts of the several States, and particularly those of the United States; and in the cases of Dartmouth College, of Fletcher and Peck, and of Green and Biddle, and of many others which need not be referred to, the principles applicable to questions of this sort are well settled, and the only difficulty is to apply them to the facts of particular cases. A distinction between the right and the remedy is made and exists. But where the remedy has attached itself to the right, and is being prosecuted by 'due course of law,' to separate between them, and take away the remedy, is to do violence to the right, and comes within the reason of that provision of our Constitution which prohibits retrospective, or, in other words, retroactive, laws from being passed, or laws impairing the obligation of contracts.

"By the Act of 1829, all slaves in whose favor there is a devise of liberty, and where the representative of the testator refused to apply to the County court, they may file a bill, by their next friend, in this court. The Act of 1831 attempts to take away this right from a portion of them, and from that portion of them where the right and remedy had attached by the actual pendency of a suit in 'a due course of law.' Is not this partial and unequal legislation? It is believed it is. It would give me much more pleasure, if duty would permit, to conform to the will of the legislature. This feeling is inspired not only by respect and courtesy, but, perhaps, also by a lively sense of the feeble and unsustained character of judicial power, which rests only upon the moral feelings, upon the reason of the community. An improper yielding to legislative enactments is a danger more to be apprehended from the judicial department than rash or uncalled for opposition. The history of every age and of every country has, in every page of it, shown this to be the case. The independence of the judiciary ought to be anxiously preserved unimpaired; not on account of the individuals who may happen to be judges — they are nothing — but on account of the security of life, liberty, and property to the citizen." **14**, 120. [1]*Fisher's Negroes v. Dabbs et al.* 1834.

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[1] See same case, art. 1, sec. 2, p. 2.

More About the Origin of This Provision and the Bad Practices of the Monarchs Before Magna Charta Was Granted—Taxation of Litigation in England and Tennessee—Complete History of Our Statutes from 1796 to 1871—Constitutional Because Enforced Against Party Who, in the Opinion of the Court, Has Not Been Injured in His Lands, Etc.—Upon a motion to retax the costs in this case, plaintiffs moved to strike out the State tax of five dollars, and the county tax of a like amount. The motion was disallowed, and the plaintiffs appealed in error.

SNEED, J.: "It is insisted that the tax in question is but the imposition of a burthen upon the right of the citizen to go into the courts to have his wrongs redressed and his rights vindicated, and that the statute which authorized the tax is an infraction of" (this section). . . . "This section of our Bill of Rights is in substance identical with the great principle of English liberty granted by Magna Charta, and was borrowed from the twenty-ninth chapter of that celebrated instrument, which, in its original English version, was in the words following: 'No person shall be taken or imprisoned or disseized from his freehold, or liberties or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him nor send against him except by legal judgment of his peers, or the law of the land. We will sell or deny justice to none, nor put off right or justice.' By secs. 8 and 17 of our Bill of Rights the great guarantees of popular liberty announced in this chapter of Magna Charta were recognized and adopted as a part of the fundamental law of this State—first by the Constitution of 1796, again by that of 1834, and again by that of 1870. By the fourth section of the tenth article of the Constitution of 1796 it is provided[1] . . . A provision of equal import is contained in each of our subsequent Constitutions of 1834 and 1870."

Judge Sneed then quotes at length from the various statutes imposing a tax on litigation, viz.: Act of 1799, ch. 30, sec. 1, H. & C., vol. 1, p. 349; Act of 1817, ch. 138, H. & C., vol. 1, p. 349; Act of 1827, ch. 49, H. & C., vol. 1, p. 362, and says: "These several statutes authorizing a tax upon judicial proceedings were in full force and operation when the Convention of 1834 met and adopted the Constitution of that year, wherein it is declared that 'all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, be altered or repealed by the legislature.' Const. 1834, art. 11, sec. 1. The legislature which assembled next after the adoption of the Constitution of 1834 recognized and adopted these laws by re-enacting them, with certain changes, as will be seen by reference to the Acts of 1835, ch. 13, sec. 4; C. & N. Rev., 604; Code, 1858, 551, 553; and Acts of 1865, ch. 8, which last act fixed the tax at five dollars.

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[1] See art. 11, sec. 16.

"Such was the state of the law upon this subject when the Convention met in 1870 to reorganize the State government, and when the Constitution of that year was adopted and proclaimed.

"By the first section of the eleventh article it is ordained, etc. . . . We have thus been careful to show the state of the law upon this subject from the foundation of the government to the present hour, and to trace the changes of the organic law, that it may be seen that on at least two memorable occasions in the history of this Commonwealth the people have met in convention, having similar laws upon the statute book, some of which are as old as the State itself, and have reorganized their government without any ordinance or provision which in express terms abrogates or reprobates this kind of legislation. While, therefore, we can not assume that the provisions of the two Constitutions of 1834 and 1870, adopting and approving the laws then in force, so far as they are not inconsistent with those instruments, give the constitutional sanction to these statutes; yet we must hold these facts to be a persuasive argument which tends to invite, if not to justify, such an assumption.

"We have seen that the laws authorizing a tax upon law suits, to be paid by the unsuccessful party, had their origin soon after the organization of the State government under the Constitution of 1796, and having existed ever since, they have passed the ordeal of two Constitutions without express repudiation or disapproval. And it would seem remarkable that a law enforced almost every day in some part of the State for more than seventy years, and which has brought its thousands and hundreds of thousands of revenue into the State and county treasuries, should have been suffered so long, *sub silentio*, to oppress the citizens, if it be, indeed, repugnant to the Constitution. And it would seem yet more strange that in the two conventions which sat to deliberate upon this important question, with these laws before them, the subject of exemption should have engaged the attention of both, and yet that the whole instrument should be silent upon this subject.[1] . . . If it be true, then, that the laws imposing a tax upon law suits are incompatible with the seventeenth section of the Bill of Rights, there must be some marvelous obscurity in that section, since it has escaped the scrutiny of two conventions, and the vigilance of two generations not distinguished for their indifference to their constitutional rights. We are free to confess that the able and ingenious arguments submitted at the bar upon this question, on behalf of the plaintiffs, had for a time generated doubts and difficulties to which we were strangers before; but we imagine that these doubts will disappear as this subject is more thoroughly investigated. If we are correct in assuming that the power of taxation in a government is unlimited, except by the organic law, then the right of entering the courts for the purpose of litigation,

[1] See art. 2, secs. 28 and 29.

whether considered as a species of property, a franchise, or a privilege, is one that can not escape this all-pervading power. Whether a law is void for repugnancy to the Constitution, is at all times a question of delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. Potter's Dwarr., 65; 6 Cranch, 128.

"The right to litigate in the courts is a common right, and therefore it can not be said to be taxable as a privilege. . . . But the right to litigate one's rights in the courts is a species of property—an incorporeal property—and all property is taxable in this State. . . . The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. . . . The promise is not to the man who deals unjustly, who builds his house by unrighteousness, and who defrauds and wrongs his neighbor, but to him who has been injured in his lands, goods, or reputation. The tax is imposed on the 'unsuccessful party,' who, in the opinion of the tribunal adjudicating the case, is in the wrong—who has *not* been injured in his 'lands, goods, or reputation,' but who has wronged his adversary—and it becomes, therefore, in this view, not a tax upon the judicial remedy, but a tax upon unrighteous litigation. If, indeed, the tax were upon the plaintiff as a condition precedent to his litigating his right in court, yet no tax could amount to an inhibition upon him, as we have our actions *in forma pauperis*, with one or two exceptions, as a remedy in all conceivable cases. . . . It is in our opinion clear that the law may impose terms upon the right of litigation, provided the same be uniform and in the shape of a public tax for the general benefit without a violation of the letter or spirit of the seventeenth section referred to.

"It is said by an ancient law-writer of England that so much of the twenty-ninth chapter of Magna Charta, as makes King John assert that he will sell or deny justice to none, nor put off right or justice, was extorted from the monarch because it was usual to pay fines anciently for delaying law proceedings. This sometimes was extended to the defendant's life. Sometimes fines were paid to expedite process and to obtain right. And in some cases the parties litigant offered part of what they were to recover to the crown. Many instances of fines are mentioned for the king's favor, and there is a particular instance of the Dean of London paying twenty marks as a fine to the king, that he might assist him against the bishop in a law suit. Observe Magna Charta, 21. The courts of law were not in those times open courts, says the same author, as they are now understood to be. 'An open court at present (1766) is generally so crowded with spectators that no one who

hath any real business to do can have access; or, if he procure access, he is not so much at his ease as those whose interests are depending have a reasonable right to insist upon. The old law required that the plaintiff or defendant should pay nothing, but that the idle part of the audience should pay one penny each for admittance, which may be nearly equal to a shilling at present, when the servants of judges at the old Bailey, and the officers of the courts in Westminster hall, have upon certain occasions taken not only a penny from the spectators, but even insisted on gold. Are they not within the letter and spirit of the law?' asks this quaint old expounder, 'and is it not incumbent on the judges to put it in execution agreeable to what is enjoined?' *Id.* 102. 'These little circumstances,' says he, 'show strongly that to the manners of the times, we are undoubtedly indebted for that great principle of Magna Charta, which forbids the sale, denial or delay of justice, and not the just and legitimate exercise of the taxing power, which is for the benefit of all, and not for the exclusive behoof of the servants of judges at the old Bailey or the officers of the court in Westminster hall.' The object and purview of this celebrated chapter of Magna Charta are therefore best interpreted by the 'manners of the times,' which led the barons to demand it. Thus we are told by the historian that the ancient kings of England put themselves entirely on the footing of the barbarous eastern princes, whom no man must approach without a present; who sell all their good offices, and who intrude themselves into every business that they may have a pretext for extorting money. Even justice was avowedly bought and sold; the king's court itself, though the supreme judicature of the kingdom, was open to none that brought not presents to the king; the bribes given for the expediture, delay, suspension, and doubtless for the perversion of justice, were entered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times.

"The barons of the exchequer, for instance, the first nobility of the kingdom, were not ashamed to insert as an article in their records that 'the county of Norfolk paid a sum that they might be fairly dealt with; the borough of Yarmouth, that the king's charter which they have for their liberties, might not be violated; Richard, son of Gilbert, for the king's helping him to recover his debt from the Jews; another that he might be permitted to make his defense in case he were accused of a certain homicide; another still, for free law if accused of wounding another; and another for having an inquest to find whether certain parties were accused of murder out of ill will or for just cause.' These are a few of a great number of like instances preserved in the ancient rolls of the exchequer. 1 Hume Hist. Eng., 504. These are the sales, delays and denials of justice, which influenced the barons, in the words of the historian, 'to take an oath before the high altar to adhere to each

other, to insist on their demands and to make endless war on the king until he should submit to grant them.' *Id.*, 462.

"We apprehend that in the three conventions of Tennessee the idea of taxation was never for a moment considered in connection with the seventeenth section of the Bill of Rights. As it was official plunder, and not taxation, which gave it birth in Magna Charta, so it was ordained as a part of our own organic law, in the light of history, not to circumscribe this high attribute of sovereignty, but to elevate the standard of judicial morals, to purify the fountains of justice and warrant forever the right of the injured citizen to enter the courts and demand his rights upon such terms, applicable to all alike, as the law may prescribe for the general good. Let the judgment be affirmed." **54**, 35. *Harrison, Pepper & Co. v. Willis et al.* 1871.

Statutes of Limitations—Construction of—War—Obligation of Contracts—M. & V., 3117, 3118.—FREEMAN, J.: "We hold, that the construction of these statutes is, that they are only applicable to a normal state of things, when the machinery of government is regularly organized, and remedies are furnished to parties for the enforcement of rights through courts of justice. . . . This clause of the Constitution indicates distinctly what was the normal state, or established condition of things, under which these statutes were enacted and intended to operate. This instrument is the basis of the government; is the Constitution, under which the legislature existed which passed these laws. They were passed while this clause of the Constitution was a living, practical, operative provision, and in view of the fact that this state of things, ordained and established by the supreme law of the State, was not only in actual operation, and the courts open, but that they were expected to be at all times open, and every man to be furnished, in fact, with a remedy by due course of law for the enforcement of all legal rights guaranteed to him. In view of this clause of the Constitution of our State, and the clause of the Constitution of the United States, sec. 10, art. 1, prohibiting any State from 'passing any law impairing the obligation of contracts,' we think that if a law had been passed by the legislature, enacting in so many words, that a man's right to recover his debt due on a contract, should be barred in six years, or any other period, notwithstanding there were no courts in operation or open in which he could bring his suit, such law would have been declared void, as violative of the provision that the courts should be open, and every man entitled to his 'remedy by due course of law' for injuries done him in his lands, goods, person, or reputation. It would also have been held void as impairing the obligation of contracts—their legal obligation—which must necessarily consist in an efficient remedy for their enforcement."[1] **54**, 339. *Harrison v. Henderson et al.* 1872.

[1] Case criticised, Girdner *v.* Stephens, Schedule, sec. 4.

Suits Against the State.

This Provision a Dead Letter Unless Proceeding Pointed Out by the Legislature—Obligation of Contract—Art. 1, Sec. 8.—OVERTON, J., held: "On general principles, the idea of an individual citizen compelling the sovereign to do an act is repugnant to every idea of sovereignty; and the provision of the Constitution that suits may be brought against the State in such manner and in such courts as the legislature may by law direct, is a dead letter until some mode of proceeding shall be pointed out by the legislature. Where, therefore, the legislature passed an act prohibiting the registers from issuing a grant to a certain person, or his assigns, on a certain certificate, and an application was made by an assignee for a mandamus to compel the register to issue the grant, it was held that the mandamus could not be granted, although the act was unconstitutional. But it was held, also, that if the State issue a grant to any other person the court of equity would, upon being satisfied of the right of the person claiming under the certificate, divest the title out of the grantee and vest it in such person." 3, 214. *Williams v. Register of West Tennessee.* 1812.

Violation of Law by Public Officer—State Not Liable For—Relation of State to Citizen.—ANDREWS, J.: "The State may contract with one of its citizens, and a liability to the citizen may arise by the terms of the contract. But the relation of the State to the citizen is not in such sort the relation of an agent to his principal, that for any failure properly to perform the functions of government the State will be liable in damages to the citizen.

"The Constitution of this State provides that writs may be brought against the State in such manner and in such courts as the legislature may by law direct. And section [1]2807 of the Code, in force at the time these bills were filed, provides that 'actions may be instituted against the State under the same rules and regulations that govern actions between private persons.' The constitutional and statutory provisions provide a remedy for any existing cause of action, but do not change the relation between the State and the citizen so as to create any liability or responsibility on the part of the State.

"The relation of the State to the citizen is not one of contract, which implies an undertaking upon good consideration on the part of the State, that all the functions of government shall be duly performed, or that it will employ none but capable and faithful agents. If an officer or agent of the State, in violation of law, commits an act to the injury of the citizen, it is an act beyond the scope of his agency, unauthorized by his principal, and the State is not liable therefor to the party injured." 47, 317. *Clark et al. v. The State.* 1869.

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[1] Repealed.

No Vested Right in a Particular Remedy in Existence at Time of Contract—Exceptions Where Remedy is Part of Right Itself—Statute Permitting Suits Against the State—Repeal of, No Impairment of Obligation of Contract.—NICHOLSON, J.: "It is uniformly held that a sovereign State is not liable to be sued in its own courts without its own consent. The general principle is that when States enter into contracts, the liabilities so incurred can only be enforced by petition or memorial to the legislative department, whose legitimate business is to provide the means and to make the necessary appropriations to meet the liabilities of the State. This remedy is secured by a constitutional guaranty in our State, and during much the greater portion of our existence as a State it has been the only remedy for enforcing its liabilities. In reference to liabilities incurred, as between individuals, or between individuals and corporations, all of our Constitutions have provided for their redress or enforcement through the agency of the judicial department. And in each of our three Constitutions this distinction between the remedies to enforce liabilities or redress grievances, as against individuals or corporations and the State, has been recognized. . . . By this provision every man has a right to resort to the courts for the redress of all grievances as against individuals or corporations; and for this purpose it is required that the courts shall be open, but the right to resort to the courts to redress grievances as against the State only exist where the legislature has exercised its discretion in prescribing the manner and the courts in which suits may be brought against the State. The right which an individual or a corporation has to enforce a liability as against the State, is as much a vested right as that which he has against another individual or corporation; but in the latter case the right can be enforced only through the courts, whereas, as to the former, the legitimate tribunal for the enforcement of the right is the legislature, unless the legislature provides for its enforcement through the courts. After the legislature has made such provision, the party having cause of complaint against the State has his rights either through the courts or by appeal to the legislature. But while the right to sue is a vested right, which cannot be taken away without impairing the obligation of the contract, yet there is no vested right in a particular remedy which may be in existence at the time of the contract. This is the general rule, and the exceptions are those peculiar cases in which the remedy is part of the right itself. . . . When the remedy by suit in court was repealed, the remedy by application to the legislature was left in full force. The remedy by suit in court was not given to the company in consequence of any constitutional injunction upon the legislature to furnish such remedy, but purely as a matter of favor to the creditors of the State, thus giving them the choice of two remedies, whereas none but the remedy by suit was given to other creditors as against other debtors

than the State. During most of the existence of the State the remedy by application to the legislature was the only remedy given to the creditors of the State, and we are bound to presume that it had proved sufficient and effective during more than fifty years of the history of the State. The State was under no obligation to her creditors to furnish them the remedy by suit, nor under any to continue that remedy longer than the legislature should deem it sound policy to withdraw it, and leave her creditors to the remedy by application to the legislature. . . . We have been considering the case upon the assumption that the section of the Code[1] authorizing suits to be brought against the State constituted a contract between the State and the railroad company, and we have reached the conclusion that, even upon that assumption, the repeal of that section was no such impairment of the obligation of the contract as furnished ground of complaint to the company. But it was not necessary to consider the question in that aspect. The section of the Code referred to was no contract; it was no more than an act to regulate the proceedings and define the jurisdiction of the courts of the State where the State is a party defendant." **62**, 403. *The State et al. v. Bank of Tennessee et al.* 1874.

Doctrines Announced in Preceding Cases Reaffirmed by State and United States Supreme Courts.—NICHOLSON, J.: "It is a legal as well as political axiom, that no sovereign government can be sued in its own courts, except by its own consent. By our Constitution, 'suits may be brought against the State, in such manner and in such courts, as the legislature may, by law, direct.' But this constitutional provision remains a dead letter, until some mode of proceeding is pointed out by the legislature. Williams *v.* The Register. At the time the bank charter was passed, in 1838, the legislature had pointed out no mode, by which the State might be sued in the courts. There was then at that time no statute of the State authorizing the enforcement of this contract in the courts, and consequently no such statute entering into that contract, and constituting part of its obligation. The holders of the notes could only rely upon the good faith of the State, through legislative enactments, for the enforcement of the contract. It is clear, therefore, that while the Constitution of the United States protected the obligation of the contract from impairment by the State, there was no law furnishing a remedy for its enforcement, which constituted any part of the obligation of that contract, and the State was under no obligation to furnish any other remedy than that then existing.

"It is true, however, that in 1855, the State gave her consent that suits might be brought against her as against individuals; and this law remained in force until 1865, when it was repealed, and since that time

[1] M. & V., 3507.

no law has been enacted authorizing suits against the State. It was during this period that the Act of 1855, carried into the Code, section 2807, was in force, that the notes of the bank now in controversy, were issued; and down to its repeal in 1865, the holders of the notes so issued had the right to enforce the contract of guaranty, contained in the twelfth section of the bank charter.

"But the Act of 1865 was an ordinary act of legislation, regulating the jurisdiction of the courts of the State, and furnishing a new remedy by way of suits against the State. This act contained no stipulations, that it might not be afterwards modified or repealed, if in the judgment of the legislature, its modification or repeal should be demanded by the public interests. Nor could such a contract be implied from the passage of the Act of 1855. As held by the Supreme court of the United States, in the case of Beers *v.* The State of Arkansas, 20 How., 530, it was competent for the legislature to repeal the Act of 1855 altogether, and put an end to the jurisdiction of our courts in suits against the State; and in exercising this power, the State would violate no contract with the parties. It would be merely regulating the proceedings in her own courts, and limiting or withdrawing the jurisdiction she had before conferred, by the passage of the Act of 1855. . . .

"But the legislature has not stopped by simply repealing the Act of 1855 (Code, sec. 2807[1]), which authorized suits to be brought against the State. In 1873, by chapter 13, it was enacted, that 'no court in the State has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the State, or against any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property,"[2] etc. 68, 475. [3]*The State ex rel. Bloomstein v. Sneed.* 1876.

Courts Have Jurisdiction to Compel Officers of the State to Perform Ministerial Duties.—McFarland, J.: "The Act of 28th of February, 1873, declares that no court in this State shall have jurisdiction 'to entertain any suit against the State or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds or property.' We have decided quite a number of cases since this act was passed, awarding the process of mandamus against the comptroller, to compel him to issue warrants to parties having claims against the State allowed by law. Baxter *v.* Burch, 12 Heis., 601; Publishing Co. *v.* Burch, Ib., 607; Uhl *v.* Gaines, 4 Lea, 352, besides quite a number of unreported cases. The effect of the Act of 1873 seems not to have been considered in those cases; but, it would certainly not be construed to deprive the court of jurisdiction to compel a ministerial officer to per-

[1] M. & V., 3507.

[2] Affirmed by U. S. Supreme court Nov. 26, 1877, Hunt, J., delivering the opinion, which is reported in 96 U. S., 69–75.

[3] See same case, art. 1, sec. 20.

form a plain ministerial duty; and when the demand of the relator is allowed by law, it is the plain ministerial duty of the comptroller to issue his warrant, even though in determining this question the court may have to declare legislative acts unconstitutional. Otherwise, the decision of the comptroller would be final, and the party having a demand allowed by law without remedy. Such proceedings, so far from being suits against the State, are in fact such in the name of the State to compel its officers to perform their duty." E. H. EWING, Sp. J., dissented. 76, 256. [1]*Lynn v. Polk et al.* 1881.

Liability of Counties and Municipal Corporations.

Taxing District — Failure to Repair Streets — Not Liable for Injuries, When — How a Constitution Must Be Understood. — By the Act of 1881, ch. 96, the original Taxing District Act, sec. 19 was amended so as to read: "That the counties in which taxing districts are situated, and the taxing districts themselves, shall not be liable for damages or injuries to persons or property by reason of defects in the streets or alleys, or other property under the control and within said taxing district," etc. The contention of the plaintiff was that this act was in violation of this section of the Constitution. COOPER, J.: "It will be noticed on the face of this section of the Constitution that, notwithstanding the generality of the language touching a man's remedy for an injury to his person, reputation or property, yet there is a class of injuries for which there is no remedy unless the legislature shall so direct by law, namely, injuries inflicted by the State. Until the legislature chose to legislate on the subject there was no redress in the courts. Williams *v.* The Register. And the redress or remedy thus given might be repeated at any time. State *v.* The Bank of Tennessee, 3 Baxt., 395. A Constitution, moreover, must be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. The Constitution is not the beginning of law for the State, but it assumes the existence of a well-understood system, which is to remain in force and be administered, under such limitations and restrictions as that instrument imposes. Cooley Const. Lim., 74; People *v.* Draper, 15 N. Y., 537; Pope *v.* Phifer, 3 Heis., 682. By the common law the citizen had no remedy against a county for an injury caused by the neglect of the county to keep the public roads in good repair. And such is the state of the law to this day, although the county is a municipal corporation. Wood *v.* Tipton County, 7 Baxt., 112; White's Creek Turnpike Company *v.* Davidson County, 14 Lea, 73. The reason is, that the county, in its municipal capacity, is only an arm or instrument of the State to carry out its sovereign prerogative in opening

[1] See same case, art. 1, sec. 20; art. 2, sec. 2. See Act 1873, ch. 3.

and keeping up public roads, and the legislature may give it only such powers as it deems best, and limit its liability accordingly. Originally, the State alone could levy taxes for the county. Marr *v.* Enloe, 1 Yer., 452. And although the Constitution now authorizes the legislature to delegate to counties and incorporated towns the power to tax for county or corporation purposes, the legislature may refuse to delegate it, and reserve to itself the exclusive right. Luherman *v.* Taxing District, 2 Lea, 425.

"The current of authority, while recognizing the exemption of counties from liability for injuries caused by failing to keep the public roads in repair, nevertheless holds an incorporated town liable for a similar injury occasioned by neglect of its public streets. The reason of the distinction is, that municipal corporations of this class, while still arms of the State government, are more complete entities, and are enjoined and given the power to maintain the streets in a safe condition. 'But, in addition,' says Mr. Dillon, 'the duty or burden must appear, upon a fair view of the charter or statutes, to be imposed, or rest upon the municipal corporation, as such, and not upon it as an agency of the State, or upon its officers as independent public officers.' Dillon on Mun. Corp., sec. 789. If, in fact, the municipal corporation stands, in relation to its streets, in the situation of a county as to its public roads, the liability for neglect of duty would be the same. In the case before us, the municipality exercises supervision over the paving and repair of streets and the construction of bridges, and has power to enter into all necessary contracts for work, but 'subject to the limitations and restrictions' of the Taxing District Act. Some of these restrictions we have seen, under which if, as the declaration alleges, 'ample taxes for the purpose' have been levied by the legislature and placed in the control of the taxing district, there may be no funds on hand to justify any contract. The power to tax for any purpose is expressly withheld from the corporation. It is clothed with less power in the matter of taxation than the county. And if a sufferer from a defect in the streets can only look to the legislature for redress, a suit against the corporation would be unwarranted. The corporation is in reality only an agency of the State in the matter of its streets, and an essential element of liability is wanting." **84**, 531. [1]*Williams v. Taxing District.* 1886.

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[1] See same case, art. 1, sec. 8, p. 59.

IMPRISONMENT FOR DEBT.

ART. 1, SEC. 18. The legislature shall pass no law authorizing imprisonment for debt in civil cases.[1] [Const. 1834, art. 1, sec. 18, read: "That the person of a debtor, where there is not strong presumption of fraud, shall not be detained in prison, after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law." Const. 1796, art. 11, sec. 18, was same, except that the word "continued" was used in that instrument in place of "detained." See Woodfin *v.* Hooper, art. 1, sec. 20, and Acts of 1831 and 1842.]

Act Requiring Persons Convicted of Misdemeanors to Work Out Costs, Etc.—Moseley was convicted of keeping a gaming house, and fined fifty dollars and costs. In pronouncing judgment the court directed that if the fine and costs be not paid or secured, he be committed to the workhouse of Gallatin to work out the same. GARNER, Sp. J., held: "This provision has no reference to the enforcement of the collection of *fines, penalties* and *costs* from *defendants,* who have been *convicted of misdemeanors* in the violation of the statutes of the State, or of the ordinances of a municipal corporation. The 'Act approved March 23, 1875, ch. 83, pamphlet acts, p. 117, entitled 'An Act to require persons convicted of misdemeanors to work out the costs of conviction,' enacts, etc. . . . Under this act, the judgment pronounced in this case, by his honor, the circuit judge, is authorized." 78, 495. *Moseley v. The Mayor etc. of Gallatin.* 1882.

Compelling Corporations to Cash Their Own Scrip—Act of 1887, Ch. 209, Void.—W. A. HENDERSON, Sp. J.: "The Act of March 29, 1887, enacts that from and after the passage of that act it would be unlawful for any person or persons, firms or corporations or companies, to refuse to cash any checks or scrip of their own that may be presented them within thirty days of its date of issuance, and that any such person who should refuse to redeem, in lawful currency, any such checks or scrip would be guilty of a misdemeanor, and, upon conviction, should be fined not less than ten nor more than twenty-five dollars for each offense. In other words, that when any person who owed a debt which was evidenced by check or scrip issued by him, did not cash the same within thirty days of its issuance, he would be guilty of a misdemeanor, and fined accordingly, which judgment, of course, under the general law, would be liable to be enforced by confinement in the workhouse. The question is, whether or not that act is violative of the fundamental law of the land. If this statute, and the indictment under it, can be maintained, any citizen, corporation, or company drawing a check or giving a written order, in good faith, in favor of any person, and failing, for any reason, to pay the same, or to redeem it in currency, if presented in thirty days, is guilty of a crime for which he may be punished by

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M. & V., 6114.

imprisonment. . . . The Act of the Legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the non-payment of debts evidenced by check, scrip, or order, and for such crime provides a penalty, which may or may not be followed by imprisonment. In that way and for that reason the act is violative of the spirit if not the letter of the constitutional provision above cited. It is an indirect imposition of imprisonment for the non-payment of debt, and is, therefore, clearly within the constitutional inhibition." **92**, 82. *The State v. Paint Rock Coal etc. Co.* 1892.

Act of 1895, Ch. 67, for the Protection of Innkeepers, Valid.—CALDWELL, J., held: "A statute is not invalid, as authorizing imprisonment for debt, which declares it a misdemeanor to fraudulently obtain hotel accommodations, or to fraudulently remove baggage, to defraud the proprietor. The imprisonment is inflicted for the debtor's fraud, not for his debt." **95**, 548. [1]*The State v. Yardley.* 1895.

LIBEL.

ART. 1, SEC. 19. That the printing presses shall be free to every person to examine the proceedings of the legislature, or of any branch or officer of the government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have a right to determine the law and the facts under the direction of the court, as in other criminal cases.[2]
[Same as Const. 1834, art. 1, sec. 19; Const. 1796, art. 11, sec. 19.]

Origin and History of This Provision—Jury Judges of the Law Under Direction of the Court, But not Otherwise.—FREEMAN, J., quoted the section in full, and said: "It is one of the things hard to be accounted for, how the language we have quoted was ever seen to have made any alteration whatever in the recognized traditionary and long-settled rules of the common law as to the function and rights of a jury in all criminal cases. We need but recur for a moment to the history of the heated contest that was waged so fiercely in England, in about the last quarter of the last century, down to the year 1792, when what is known as Mr. Fox's Libel Bill was passed by the British Parliament, affirming the right of a jury, in all prosecutions for seditious libel, to judge of the law and the facts as in other criminal cases, to see beyond question what principle this clause in our Bill of Rights was intended to settle by embodying it in our organic law. The contest in England had grown up in this wise:

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[1] See same case, art. 1, sec. 6, p. 12; art. 2, sec. 17.

[2] See Tenn. Leg. Rep., vol. 3, p. 107, for exhaustive dissenting opinion of Judge Freeman, in which he contends that this section has been misconstrued.

The judges of her law courts—such as Thurlow, Kenyon, Butler, and notably Lord Mansfield—had, in trials of indictment for seditious libels, charged to have been maliciously published for the purpose of exciting sedition, and tending to disturb the peace and good order of society, held that the jury had no right to return a general verdict of guilty or not guilty, but could only find the fact of publication and the application of the innuendoes to the parties as charged, and the question of guilt or innocence of the offense, that is, whether the matter thus published was a malicious and seditious libel or not, was a question of law solely for the court. This doctrine, which placed free speech and the liberty of the press at the mercy of the judges appointed by the crown, was contested by Lord Camden, the leading spirit of the time in defense of the rights of a free people (at any rate, known to us), the author of Junius, who joined in the contest with perhaps equal ability, and tenfold more virulence, being unknown. Erskine joined with Camden in the contest, and in his speech in defense of the Dean of Asaph vindicated the right of the jury to find a verdict as they might deem proper from the evidence, under the instruction of the court, with an ability that has never been surpassed, if equaled, at the English bar. Lord Camden in his last great speech on the subject, laying down and illustrating the principle for which he had so long contended, said: 'The jury judge of the essential elements of the crime in cases of murder, not the judge; so,' he exclaimed, 'the jury may judge of the intention on which the crime depends in murder, but not upon an indictment for libel.' See Campbell's Lives of Lord Chancellors, vol. 7, p. 44 *et seq.* (Life of Camden), for a review of this contest. See, also, Erskine's Speech, Selt. British El., 655.

"In view of this history, and the contest that had been had in England over the question, when the Constitution of 1834 was framed, when providing for the freedom of the press and freedom of speech, in the Bill of Rights was inserted the section quoted, and the principle of Mr. Fox's Libel Bill was embodied—that 'in all indictments for libel the jury shall have the right to determine the law and the facts'—not as they may think the law is, but 'under the direction of the court as in other criminal cases;' in plain words, should determine the law and the facts as they did in a trial for murder, or for larceny, or for any other crime. How was that? By the immemorial traditions of the common law, and the universal customs of the courts administering that law, the court instructing the jury as to what the law was, what were the legal elements of the offense, and the jury finding the party innocent or guilty, as they in their judgment found these elements in the act of the party charged; that is, they, under the direction of the court, said whether he was legally guilty—tried him by the law of the land, that law given them by the court for their guide—and then, under

our system, if convicted, the instructions, if erroneous in a matter affecting the rights of the prisoner, could be reviewed, and the case reversed and remanded for a new trial, that the law may be correctly given for the guidance of the jury, and if convicted at all, be convicted according to law. This is all that was intended, and all the language of the Constitution, fairly interpreted, means. It was not intended, nor does it change the ancient province and rights of a jury in criminal cases, but only to give the jury, or rather to secure to the jury, the right to do in libel cases precisely what they had always done in other criminal cases, to act under the instructions of the court, and judge of the application of the law given to them to the facts proven, and declare the result, either to be innocence or guilt, as the legal elements defined by the court or proven to exist, or the contrary. The opposite theory, as embodied in his honor's charge, subverts the theory of the Constitution, by authorizing the jury, if they choose, to decide the issue submitted to them, not under the direction of the court as to the law, but as *they* may conclude the law to be, which, practically, is to leave them to do as they will, guided by no law at all. The Constitution says they shall exercise their right, under the direction of the court—in no case independent of it, much less contrary to it." **75**, 545. *Harris v. The State.* 1881.

Privileged Communications.—COOPER, Sp. J.: "Whatever rights and privileges are reserved and secured to the citizen under this provision of the organic law must be sacredly preserved. But it has not been insisted directly that the right contended for by the defendants is secured to them by our Constitution, but rather by the law of libel, correctly understood, expounded and applied. Still, we have set out this provision of the Declaration of Rights as a landmark to guide us in reaching a just and true view of the subject under consideration. If we see that we are infringing upon rights therein reserved, we may well pause. On the contrary, if we see that the invaluable privileges there guaranteed are not encroached upon, but still remain intact and unimpaired in their integrity, we may feel, at least, that the freedom of the press, and free speech, still exist in their constitutional strength and vigor, and that we may have not reached a conclusion subversive of the fundamental rights of the citizen.

"The law of libel, on the subject of privileged communications, is involved in considerable uncertainty. There is more of conflict and doubt than on many other questions affecting personal rights. It is very easy to determine that certain communications are privileged, as it is called, but we soon reach a point where doubt and uncertainty begin, and here we must proceed with caution and due deliberation, lest we declare what is fallacious in principle, and establish precedents destructive of individual rights and injurious to the public welfare. In this State, we have no decision directly upon the point at issue in the

case before us, and we are left to adopt whatever rule (within the limits of the Constitution) that appears to us to be best sustained by reason. And especially do we feel at liberty to pursue this course, as we find no well-established line of cases settling the law upon this question, but rather conflict and discord, in the decisions of other courts." In this case it was held: "Neither the public press nor individuals can discuss the conduct and character of officers and candidates for office, without incurring liability, civil or criminal, for defamatory utterances published, although such publications may be made without malice and upon probable cause." 84, 181. *Banner Pub. Co. v. The State.* 1885.

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ART. 1, SEC. 20. That no retrospective law, or law impairing the obligation of contracts, shall be made.[1] [Same as Const. 1834, art. 1, sec. 20; Const. 1796, art. 11, sec. 20.]

RETROSPECTIVE LAWS.[2]

Power of the Legislature.

Statute Could be Retrospective Even if Not Prohibited by the Constitution—Legislative Power.—GREEN, J.: "Judge Haywood has said that 'the sovereign legislative power of Tennessee, like the sovereign power of all other States, of whatever character they may be, may do all things, not naturally impossible, which it deems promotive of the public welfare, except in such instances where, by the fundamental law of the nation, written by the mighty hand of the people, it is forbidden. And in any instance where legislative power is questioned, it bounds over opposition, unless a restriction upon that power in the particular instance can be clearly pointed out.'[3] To this proposition, in its full extent, I can not give my assent. By the Constitution all the legislative power of the people is vested in the general assembly; and it follows that the legislature may do any thing within the legitimate scope of legislation which is not forbidden in the Constitution, either in express terms or by implication. But certain limits to the exercise of legislative power have been

[1] For indirect or unimportant references to this section, see **80**, 490; **86**, 631; **84**, 137. See also Shannon's Sup. to M. & V., p. 292.

[2] For indirect or unimportant mention of this class of laws, see **48**, 274; **84**, 407; **91**, 406. For construction of sec. 3485, Arkansas Code, see **79**, 498.

[3] Tipton *v.* Harris, art. 1, sec. 8, p. 28.

recognized from the earliest times. It is a principle of the English common law, as old as the law itself, that a statute, even of the omnipotent Parliament of Great Britain, is not to have a retrospective effect. Why was it so considered by the English courts? They had no written Constitution with express restrictions upon the legislative power. It was so considered because there are eternal principles of justice which no government has a right to disregard. It does not follow, therefore, because there may be no restriction in the Constitution prohibiting a particular act of the legislature, that such act is therefore constitutional. Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. The common law, says Lord Coke (8 Co., 118a), adjudgeth a statute so far void." 10, 603. [1]*Bank of the State v. Cooper et al.* 1831.

Statutes Changing Remedies, etc., Affecting Past Transactions.

Ex Post Facto Laws—Adultery Committed Before Passage of Act—This Section Construed.—In this case the court decided that "The [2]Act of 1799, ch. 19, which declared adultery to be a cause of divorce, and authorized the courts to grant divorces for adultery committed before, as well as after its passage, was not a retrospective law within the meaning of the constitutional prohibition of such laws." OVERTON, J.: "Adultery, by the law of nature, is an offense. It was so before the passage of this act, and an evil in any possible view of the subject. The act, by affording relief for a matter which was criminal in itself, must be considered as so far remedial, and not *ex post facto*, as has been contended. Blackstone and other law-writers define an *ex post facto* law to relate to public punishment; and this certainly was the sense in which the framers of the Constitution received it, else why make use of the expression 'retrospective' also? This part of the act may, in a general sense, be called retrospective, but in legal phraseology it can not be called *ex post facto*. In my view of the Constitution, it can not be construed in violation of it. . . . Retrospective, here, was inserted from abundant caution. It was intended to embrace rights, and not modes, of redress; the last, from the nature of things, must be left open to legislative modification. It is not possible for me to suppose that any body of enlightened men ever intended to put it out of the power of the legislature to provide a remedy for many past transactions, which the immutable principles of justice might require; such an institution must suppose absolute foresight in man, which we all know is not one of his attributes. The wisest government that ever existed could not possibly foresee many evils which might require a remedy consistent with justice and the law of our nature. The legis-

[1] See same case, art. 1, sec. 6, p. 19; art. 1, sec. 8, p. 35.

[2] T. & S., 2448; M. & V., 3306.

lature, as it appears to me, meant that the word 'retrospective' should be restrained in its acceptation to contracts, but not marriage contracts, being incapable in its very nature of the application of such a principle. The ninth section of this act presents a distinct cause of divorce *a mensa et thoro*, which is entirely prospective; the causes expressed in the first section are entirely *a vinculo matrimonii.*" 2, 2. *Jones v. Jones.* 1804.

Remedy Existing at Time Contract Was Made — Statutes Affecting.— PECK, J.: "A distinction must be drawn between those acts of the legislature which come in aid of a remedy and such acts as impose clogs and restrictions upon remedies existing at the time the contract was made. Had the legislature said that the bank should not have process for the collection of her debts, or that the courts should not be open to the complaints of the bank, the case would be wholly different from this, where all that is attempted is to provide for such defects in the existing remedies as the bank had laid hold of to evade the payment of her notes. . . . It is not an infringement of the Constitution to come in aid of a remedy, and a contract is not impaired by a law which is made to enforce it; for we are as well to consider the contract the plaintiff below had with the bank, as to consider the contract with the State created by the charter." 10, 265. [1]*Vanzant v. Waddel.* 1829.

Accident Previous to Enactment of Law.—The statute under consideration was [2]ch. 41, passed March 2, 1858. WRIGHT, J.: "The accident, namely, the killing of the cow of the defendant in error, for which the present action is brought, occurred, according to the bill of exceptions, in August, or September, 1857; and, if need be, we think it might be readily shown that this Act of Assembly can not have retrospective construction, so as to embrace this case. It is only requisite that we refer to Dash *v.* Kleeck, 7 Johns., 478, and the authorities there cited, to establish this position." 41, 74. *Horne v. M. & O. R. R. Co.* 1860.

Common Law Considered in Connection With This Provision—English Construction—Statute Should Not be Construed to Operate Retrospectively if Susceptible of Any Other Construction—Interest on Bank Deposits—Contract Made Before Law Took Effect.—Sec. 1816 of the Code of 1858 provided that "no bank shall pay any interest or other compensation in consideration of deposits." The Code took effect May 1, 1858. The agreement between the parties was made March 29, 1855. The circuit judge held that by the provision of the Code referred to, the bank was exonerated from the obligation of its contract to pay interest on the deposit after the 1st of May, 1858; and the only question was did the court err in thus holding?

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[1] See same case, art. 1, sec. 6, p. 14; art. 1, sec. 8, p. 57.

[2] Code 1858, 1166; T. & S., 1166; M. & V., 1298.

McKINNEY, J.: "The argument for the bank is that the contract was annulled by the subsequent Act of the Legislature. It is certainly an established doctrine of the common law that if one agrees or covenants to do an act which it was lawful for him to do at the time of the contract, and an Act of Parliament comes after, making it unlawful, the statute repeals and avoids the covenant or agreement. 1 Ld. Raymond, 317, 321; 1 Salk, 198. See, also, Parsons on Contracts, vol. 2, 186; 5 Cowan Rep., 538. Whether or not this doctrine of the common law can be reconciled with the provision of our State Constitution . . . is a question not absolutely necessary to the determination of the present case; for we feel very clear, that, both upon principle and authority, the provision of the Code can not be construed to have a retrospective effect, and that its operation must be limited to contracts made after its passage.

"To avoid misapprehension, however, in regard to our views, we unhesitatingly express the opinion, that to give the enactment in question such a construction as to make it operate upon past contracts, would be to bring it directly in conflict with the provision of the Constitution above referred to. We concur with Mr. Kent, that a retrospective statute, affecting and changing vested rights, is founded on unconstitutional principles, and consequently, inoperative and void. 1 Com. (9th ed.), 508. This doctrine, however, does not, in general, apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. Ibid., and note.

"The doctrine that a statute is not to have a retrospective effect, is clearly shown (in the very elaborate case of Dash *v.* Van Kleeck, 7 Johns. Rep., 477), to be founded not only in the jurisprudence of England, but upon principles of general law. In his opinion in that case, Mr. Chief Justice Kent, says: 'It is a principle in the English common law, as ancient as the law itself, that a statute, even of its own omnipotent Parliament, is not to have a retrospective effect,' for which he cites numerous ancient standard authorities, as well as modern. Lord Bacon lays it down, that no statute is to have a retrospect beyond the time of its commencement. 6 Bac. Abr., 370; 2 Inst., 292; 2 Mad., 310, 228; Duarris on Statutes, 680. Mr. Blackstone regards it as a first principle, that all laws are to commence in future, and operate prospectively. 1 Com., 44.

"This principle received an impressive recognition in the court of king's bench, in giving a construction to the statute of frauds (29 Charles II, ch. 3), which enacted, that 'from and after the 24th of June, 1677, no action should be brought to charge any person upon any agree-

ment, etc., unless such agreement be in writing.' After the passage of this statute, a suit is brought upon a parol promise made before, but to be performed after, the day specified in the statute, and the court agreed unanimously, that the statute could not have a retrospective effect, so as to take away a right of action to which a party was previously entitled; that it could only apply to parol promises made after the day mentioned in the statute; that the opposite construction would make the law repugnant to common justice. See 2 Shower, 17; 4 Burr., 2460. This doctrine has been adhered to, generally and steadfastly, in England; and it is to be found incorporated, as a fundamental principle, in the jurisprudence of the most enlightened and civilized States, ancient and modern; and this, by force of its intrinsic reason and justice, and not because of any positive constitutional prohibition to the contrary. The principle has likewise been adhered to in this country with great uniformity of decision. See Sedgwick on Stat. and Com. Law, 188, 406; 7 Johns. Rep., 477; 3 Dall. Rep., 391, and cases referred to. And the soundness of this principle of interpretation, is sufficiently supported by the most obvious principle of reason and justice, wherever past contracts or vested rights are involved, and from the positive restrictions imposed by the State and Federal Constitutions.

"It is repugnant to every man's common sense and reason and sense of justice that a contract or promise sanctioned by the existing law, and vesting the parties with positive legal rights, when made, should be annulled and rendered inoperative by a subsequent law. As has been justly remarked by Chief Justice Kent, there is no distinction, in principle, between a law punishing a person criminally for a past innocent act, or punishing him civilly, by divesting him of a lawfully acquired right. The very essence of a new law (as said by the same distinguished judge) is a rule for future cases. And, therefore, even in cases involving no question as to the inviolability of past agreements, or previously acquired rights, the authorities concur that a statute ought never to receive such a construction as would make it operate retrospectively, if it be susceptible of any other. In such case, it is said, we are to presume, out of respect to the law-giver, that it was not intended that the statute should have a retrospective operation. The case before us furnishes a forcible illustration of the wisdom and justice of the principle we have been considering, and of the constitutional restriction imposed upon the legislature.

"The contract in the present case was sanctioned by the then existing law. By implication of law, the bank was bound to continue to pay interest so long as it retained the deposit, or, at least, until it gave notice to Hannum of its determination to put an end to the agreement. This being so, it would be manifestly unjust and subversive of general principles of law, as well as of the Constitution, to give the statute such a

construction as would make it defeat the right previously vested. We, therefore, hold that the provision of the Code has no application to the case, its operation being confined to deposits made after the first day of May, 1858, when the Code took effect." 41, 399. *Hannum Adm'r v. Bank of Tennessee.* 1860.

Act Changing Rights of Parties Accrued at Time of its Passage.—COOKE, Sp. J.: "The [1]Act of the Legislature of March 26, 1883, which provides that sec. 2291 *et seq.* of the Code be so amended that damages resulting to parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, does not apply to suits where the cause of action arose prior to the passage of the act. The act constitutes a new or additional cause of action. The rights of the parties were fixed under the law as it existed at the time of the injury, and the law which undertook to change those rights would be retrospective and void." 79, 127. *C., St. L. & N. O. R. R. Co. v. Pound's Adm'r.* 1883.

Divorce—Act not Affecting Existing Suits.—TURLEY, J.: "It is said that this act (1799, ch. 19) is repealed by the [2]Act of 1835, ch. 26, which makes different provisions, and only authorizes the court to allow alimony in cases of divorce *a vinculo*, as in cases of divorce *a mensa*. By the twenty-third section of that act it is provided that it shall be in force from and after its passage, and that nothing therein contained shall be so construed as in any way or manner to affect any suit that may be already brought and undetermined in any of the courts of this State for a divorce, either total or partial; but said suits shall remain and be proceeded in, heard and determined by said courts, according to the laws in force at the time of bringing the same. This suit was pending before the passage of the act; but it is said that the proviso is unconstitutional and void. We do not think so. It is, we apprehend, for the first time, contended that the legislature has not the power, when about to establish a new rule of action, to give to it an operation entirely prospective. We think, therefore, there is no law, either written or unwritten, which forbids this decree." 19, 136. *Chunn v. Chunn.* 1838.

Wills and Devises—Statutes Affecting.

Legislature May Provide Remedy for Existing Right—Laws Validating Registration of Deeds.—HAYWOOD, J.: "David Beatty died leaving a will and made the defendants his executors, and therein, amongst other things, made the following devise and bequest: 'I will and bequeath that the plantation I now live on be sold by public or private sale to the best advantage, and the proceeds thereof be laid out in land in the Indiana Territory, as well situated as can be procured, and the

[1] M. & V., 3139.

[2] Code, 1858, 2467-8; T. & S., 2467-8; M. & V., 3324-5.

right thereof vested in my negroes, which I now own, viz: (naming them) each or all of them with their increase, to whom I give their entire freedom, and the settling of them on the above-named land, under the direction of my executors,' etc. Ann Hope, the sister of the deceased, claims the negroes, as his next of kin, and his lands as heir at law. The County court of Davidson, that being the county where Beatty resided at the time of his death, refused, when applied to for the purpose, to emancipate the negroes, and a decree was made in the present case, that twelve months should be allowed to Johnson to procure their emancipation. He applied to the legislature, who then passed an act authorizing any Circuit court to which application might be made, to receive and consider of the petition for emancipation, and to grant it or not, as they might deem proper. The Circuit court for the county of Sumner was applied to, and granted the petition upon the terms prescribed by law, and the negroes were carried by Johnson to the State of Indiana, where they now are, emancipated and free. Johnson then sold the land directed by the will to be sold for purchasing another tract in Indiana for their maintenance. . . .

"Did the trust fail for want of persons to take it? Suppose the direction had been to purchase land in Indiana for the use and benefit of a child of a free person, which should be born in the lifetime of these negroes, and such child should be born in their lifetime, the trust would vest in him, such birth being within the time limited to prevent perpetuities. So here, if the negroes be made free at all, it must necessarily be in their lifetime, and the estate will not be unalienable, waiting for the trust to attach beyond the time limited, and so is not void as tending to lock up the estate in perpetual seclusion from the purposes of commercial enterprise. If the trust be not void on account of its tendency to a perpetuity, then the objects of the testators' bounty were capable to take in reasonable time after his death, though not capable at the time of his death and before emancipation; and there is more reason that they should take according to the will of the testator, than that the heir should take, against his express purpose that she should not.

"But it is said that the property vested in Ann Hope, and could not afterwards be taken from her. Answer: It vested in her *sub modo*, as it does by descent to a more remote heir, until a nearer be born. As, suppose it vest in the brother of the deceased, and six or eight months afterwards the wife of the deceased is delivered of an heir. So here, the land vests in the heir till a purchaser come into *esse* under the power, and then in the purchaser, immediately, by and from the ancestor.

"Again, it is said, that having vested in Ann Hope, it could not be taken from her by an Act of the Legislature. Answer: The legislature did not in the least degree interfere with the power, but left it precisely as it was at the death of the testator. Again, it is said, that the legis-

lature had no right to qualify the slaves to become capable of taking, when, but for the legislature, they would have remained incapable. Answer: They were capable to be made free by the existing laws; they did not derive the capacity from an after Act of the Legislature. The legislature only provided a remedy for an existing right. It is not unconstitutional to provide a new or additional remedy for a just right already in being, and which would be lost and destroyed if no remedy were provided. Deeds not registered in time, upon this ground, may be admitted to registration by a new Act of the Legislature." **10**, 123. *Hope v. Johnson et al.* 1826.

Retrospective Laws May Be Made Where They Do Not Impair Obligations of Contracts Nor Divest or Impair Vested Rights—This is the General Rule—Laws Not Retrospective—Devise—After-Acquired Lands.—The will in controversy was dated October 3, 1830, and the testator died in 1849. HOUSTON, Sp. J.: "It is insisted that if the [1]Act of 1842, ch. 169, sec. 4, in terms applies to wills made before its passage, and the legislature intended that it should so operate, it is inoperative and void because in direct conflict with our Declaration of Rights, art. 1, sec. 20. . . . If this is true, then of course there is an end of the question, so far as the Act of 1842 is concerned. It is true that, taking the provision in its literal terms, the Act of 1842, and all other legislation having in view past transactions of whatever nature or character, would be in conflict with it. But taking it in its limited and restricted signification, as defined by our courts of justice, and there are many cases of retrospective legislation that are not prohibited. But is the Act of 1842 one of the cases not prohibited by it? This section of the Bill of Rights has been so often directly and indirectly before the courts, and has received such a uniform legal construction, that we do not feel authorized, were we so inclined, to depart from it. We understand that construction to be that retrospective laws may be made where they do not impair the obligation of contracts, or divest or impair vested rights. And hence the legislature may make laws for the extenuation or mitigation of offenses; for repealing former laws; for the enforcement of contracts already made; or to make a paper, authenticated according to its directions, evidence, though not evidence before; laws affecting the authentication and solemnities of contracts; laws giving further time for the registration of deeds; laws validating deeds, and the defective probate of deeds; laws providing for the payment of the officers and agents of the State for services already performed; laws providing new and additional remedies for a just right already in being; laws modifying or changing remedies, and all other strictly remedial laws; and there are many other laws that are retrospective, according to the letter,

[1] Code 1858, 2195; T. & S., 2195; M. & V., 3035.

yet not prohibited by the Bill of Rights. 1 Meigs' Dig., 305, 306. . . . A retrospective statute, affecting or changing vested rights, is generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations. 1 Kent, 455.

"We are satisfied that the principle above stated, for there are, necessarily, cases almost without number, constantly arising under our system of government that require the passage of laws in reference to past transactions—not for the purpose of infringing rights, but to protect them from loss or injury; and we are not aware of any case in which it has been held that a retrospective law, simply because retrospective in terms, is unconstitutional and void. They have been so held, as connected with rights and obligations, where they affect or change vested rights, or impair the obligations of contracts. It is true that it has been said, by high authority, that retrospective laws are generally unjust, and neither accord with sound legislation nor the fundamental principles of the social compact. Story on Const., sec. 1392. But this can not be justly predicated of such retrospective laws as are sanctioned by our courts. It may be said that to open the door to the passage of any retrospective law is to open it to the passage of all such laws, and to an abuse of legislation on the subject; but this may be said of all legislation on any subject. Our courts are the judges of the powers of the legislature, and are open to correct the abuses of these powers, and to guard against unconstitutional legislation; and as we must necessarily have retrospective laws, and as many such are wise and proper, it is for the courts to judge whether rights are divested or contracts impaired by them, and so to declare the law. Now, with this understanding of the meaning of the Bill of Rights as above stated, what is the character of the Act of 1842, ch. 169, sec. 4? It can not be denied that it materially changes the character and effect of the will in question from what it would have had if the statute had not been passed. Its construction is different from what it would otherwise have been. It could not have passed after-acquired real estate; but now it may. It could not have been available, in the hands of defendant, as evidence of her title to the property in controversy; but now it may be. But this is all that can be said of the Act of 1842, and is this sufficient? If this difference of character and effect produced a like difference or change of vested rights under it and by virtue of it, then we would say that it comes within the prohibition, and would be inoperative. But is this so? Is any contract impaired, or right infringed or divested? It seems to us, most clearly,

that such is not its effect. The law merely acts upon a paper which does not arise in contract, or vest rights or create obligations. It creates or establishes a new rule of law as to the paper and its subject-matter, to the injury of no person whatever. Although, as to form, the will was perfect in October, 1830, still it is ambulatory until the death of the testator; it is to be his will at his death, or not, as he may see proper to determine. It vests no rights. It imposes no obligation. It is virtually a blank until the death of the testator. It does not abridge his rights, but rather enlarges them. It enables him to do what before he could not do, however strong may have been his wish or intention, and however clear it might have appeared on the face of his will. We think the control of the whole subject of wills, and the transmission of property by will, is under the control of the legislature; and if the act had said that no estate, right, or interest in lands shall hereafter pass by will, would any of the land of Albert H. Wynne have passed to the defendant by virtue of his will? We can not conceive upon what principle it would have so done, under our decision on the subject of retrospective laws; and the principle is the same in the case supposed and in this case; and we think that the Act of 1842, ch. 169, sec. 4, is not in conflict with the twentieth section of the Bill of Rights." 32, 410. *Wynne's Lessee et al v. Wynne.* 1852.

Judgments—Statutes Affecting.

Judgment Against Surety on Writ of Error.—The question in this case was a writ of error upon which security was given before the passage of the [1]Act of 1807, ch. 81, sec. 3. This act directs that the court shall enter up judgment against the principal and security, for twelve and one-half per cent interest. A motion was made against the principal and security. Held: "This can not be allowed, as before the passage of the act the court could not give judgment against the security upon a writ of error without *sci. fa.* This act can not have a retrospective operation." 1, 334. *Shaw Assignee v. Bowen et al.* 1808.

Word "Retrospective" Followed by Explanatory Words—Meaning of—Posterior Legislation Confirming Past Transactions—Ex Post Facto Laws.—In considering the Act of 1819, ch. 19, sec. 1, which directed that "no execution shall issue upon a judgment until two years after its rendition, unless the plaintiff shall endorse upon the execution that the sheriff may receive in satisfaction the notes of certain banks, HAYWOOD, J., said: "There is yet another part of our Constitution which some suppose takes from the legislature the power to suspend execution. . . . This clause, taken in its common and unrestrained sense, extends to all prior times, persons, and transactions, whether civil or

[1] H. & C., vol. 1, p. 6; Code 1858, 3137; T. & S., 3114; M. & V., 3827.

criminal; yet, certainly, there are some cases coming within its general scope to which it does not extend. It does not extend to *ex post facto* laws, for they are prohibited by the Bill of Rights, sec. 11. It does not extend to a law for extenuation or mitigation of offenses, the remission of penalties or forfeitures. A present law may repeal a former one, or may enforce a contract heretofore made, or may make evidence a paper authenticated according to its directions which was not evidence before, or may suspend computation under the Act of Limitations for a certain time past, during which a war existed, or no courts were in being; nor are laws void which give further time for the registration of deeds, nor for the disallowance of land warrants unfairly issued; nor divorce laws; nor laws making allowances to members of assembly, their clerks and doorkeepers, after the service is performed. That the term retrospective has a very restrained meaning, is abundantly testified by the conduct of subsequent legislatures and of the judicial tribunals of the country. In February, 1796, the Constitution was made; in March, 1796, the legislature gave further time for the registration of deeds, and made registrations under it as good and valid to all intents and purposes as if such deeds had been registered in proper time. Similar laws have been made in 1801, 1803, 1805, and almost at the expiration of every two years. These acts have been frequently held valid by judicial determinations. The Acts of 1796, ch. 20; 1797, ch. 14 and 43, sec 4, ch. 45; 1799, ch. 35, sec. 2, ch. 47; 1801, ch. 19; 1807, ch. 85, are all of them retrospective in the most general sense of that term; but they are of unquestionable validity. And what are the laws of 1801, ch. 24; 1803, ch. 25; 1805, ch. 4, for confirming administrations granted and marriages solemnized under the Franklin government, and for giving old verdicts the force and effect of judgments entered upon them? In short, so many are the past transactions upon which the public good requires posterior legislation, that no government can preserve order, suppress wrong and promote the public welfare, without the power to do so. It is not withheld from any of the State governments, unless the present clause be an exception. Nor does the genius of free government demand that it should not be exercised, as it does, that the legislature should not have power to pass an *ex post facto* law; because with that engine, a dominant faction might spread destruction through the ranks of its political adversaries.

"The laws of 1783, ch. 7; second 1794, ch. 13; 1803, ch. 1, sec. 5, were all of them retrospective in whole or in part, but were never deemed unconstitutional. All these, and many other acts of the legislature, establish the truth of the position that there are some, and indeed many, cases in which retrospective laws may be made. We have viewed with earnest attention the Bill of Rights, sec. 20, and have considered the inconveniences which any one interpretation will

produce, and have finally settled down in this opinion that the word retrospective, as in the North Carolina and Maryland Constitutions, it is followed by explanatory words, so here it is explained by the words which immediately follow, 'or law impairing the obligation of contracts,' and that the whole clause and both sentences taken together mean that no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made, the latter words relating equally to both the preceding substantives; and, therefore, that the term retrospective alone, without the explanatory words, can have no influence in this discussion." 7, 16. [1]*Townsend v. Townsend et al.* 1821.

Judgment by Motion Against Sheriff—Pre-existing Default.—REESE, J., held: "An act which gives a summary judgment by motion against a sheriff, although its terms are sufficiently comprehensive to embrace previous defaults, yet, as it creates a new right as well as furnishes a new remedy, can not be permitted to have a retroactive application to cases of pre-existing default." 18, 506. *Wood v. Orr.* 1837.

Rights Under a Decree Not Affected by Subsequent Legislation.—REESE, J., held: "An act of the legislature curing defective probates and registration, passed subsequent to the rendition of a decree of the Chancery court settling rights under the defective probate, can not have any effect on those rights." 26, 85. *Garnett et al v. Stockton et al.* 1846.

Regulation of Remedy—[2]Act of 1844, Ch. 167.—GREEN, J., held: "This act, being the regulation of the remedy and not the creation of a right, is not retrospective in the sense in which the Constitution prohibits the passage of such laws, and applies to all cases where the bills are filed after its passage, although the contracts were entered into, or the judgments obtained, before its enactment." 26, 130. *Brandon v. Green.* 1846.

Act Authorizing Revival of Suits in Certain Cases.—The legislature, in 1850, passed an [3]act authorizing the revival of suits in actions for forcible or unlawful entry and detainer. The second section of this act declares "that this act shall apply to all cases now pending, and which have not been abated by the order and judgment of the court where such suit may be pending."

LYON, Sp. J.: "This case is clearly embraced in the provision of the act, and if the second section is not in violation of the Constitution, then the circuit judge erred in pronouncing judgment of abatement. But we think that it is. The Act of 1842, ch. 86, under which these

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[1] See same case, art. 1, sec. 8, p. 45; art. 1, sec. 17, p. 113; art. 1, sec. 20, post.

[2] Not now in Code.

[3] Code 1858, 3369; T. & S., 3369; M. & V., 4101.

proceedings were instituted, not only gives to the plaintiff the possession of the premises for which he sues, if successful, but rent and damage also. The Act of 1850 necessarily bestows upon the persons in whose names such suits are revived all the rights which are secured to parties under the Act of 1842, ch. 46. The heir or real representative of the plaintiff, if the suit is revived in his name, would, therefore, be entitled to recover rents and damages, and the personal representative, if revived in his name, possession of the premises—rights to which they were not respectively entitled previous to the passage of the Act of 1850. The act is, therefore, retroactive in its operation, so far as it is sought to be applied to cases pending at the time of its passage, and is so far null and void." **32**, 38. *Tucker et al. v. Burns.* 1852.

Statute to Operate Prospectively, Unless on its Face it Imports Retrospective Operation—Vested Rights.—SNEED, J.: "It is a general rule that a statute is to operate prospectively, unless upon its face it imports a retrospective operation; but it is not every retrospective law that is objectionable in a constitutional sense. It is said that a vested right of action is property, just as tangible things are, and is protected from any arbitrary interference by the legislature; but this doctrine is referable to such rights of action as spring from contracts or from the common law. Cooley, 362. But the right to a particular remedy, says the same authority, is not a vested right. Id., 361. The State has complete control over the remedies of its citizens in the courts. It may give a new and additional remedy for a right already in existence, or may abolish old and substitute new remedies. Id., 361, 362. It may modify an existing remedy, or remove an impediment in the way of judicial proceedings. Id., 374." . . . Held: "The [1]Act of 1871, ch. 78, simply removes an impediment from judicial proceedings, and was intended to meet the hardships of cases, like the one at bar, where there is a meritorious cause of action and no likelihood of administration. It was intended to reach back to causes of action occuring under the Code; but it is not retrospective in the sense of the Constitution." **56**, 847. [2]*Collins v. E. T., V. & Ga. R. R. Co.* 1872.

Deeds, Acknowledgments, Etc.

Law Validating Registration of Deeds.—Dillon claimed under a grant from the State of North Carolina, and by several mesne conveyances deraigning the title to himself. There was a deed from Donnelson to Tyrrell, which was proved by one witness in the year 1804, and registered in the spring of the year 1807. Question: Is the deed from Donnelson to Tyrrell sufficiently proven and registered? Held: "The probate on the deed was made under the authority of the Act of 1803, ch. 57;

[1] T. & S., 2291; M. & V., 3130.

[2] See **64**, 695.

but at the time of the registration there was no law to authorize it, nor did any act refer to registration of deeds previously made after this took place until the Act of 1811, ch. 39, the words of which are: 'And where any such grants, deeds, or other instruments have been registered, though not within the time limited by law, the same shall be as valid as if registered according to the provisions of the before recited Act' of April, 1809, ch. 26. This act clearly makes good the registration of the deed." 2, 262. *Jackson v. Dillon's Lessee.* 1814.

Act Vacating Entries.—ROANE and WHYTE, J. J., held: "The fourth section of the Act of 1813, ch. 84, vacating entries not surveyed within the time prescribed, is not a violation of this section." 6, 263. *Huntsman's Lessee v. Randolph.* 1818.

Statutes May Validate Imperfect Acknowledgments.—TURLEY, J.: "It is said that Hugh Montgomery never acknowledged the deed in any court having jurisdiction to receive it. His acknowledgment was made in the County court of Wythe, being a court of record, and it is properly certified; but this acknowledgment was made on the 12th day of April, 1797, at a period of time when there was no law authorizing it, and it is contended that it is therefore void and inoperative. Though this deed was thus acknowledged in 1797, yet it was not registered in Davidson county till December 11, 1807; and on the 30th day of November, 1807, an act was passed by the legislature of the State of Tennessee, by which it was provided 'that all conveyances for the transfer of real property, which should be thereafter exhibited for registration, shall first have been proven or acknowledged, in the case of resident bargainors, in the court of the county or district where the land, or a part thereof, lies; and, in the case of non-residents, in some court of record in some one of the States or Territories of the United States.' The words 'shall have been first proven,' it is contended, gives the statute a retrospective operation, and makes good the acknowledgment of 1797; and so we think. When the deed was offered for probate it had been acknowledged in a court of record in the State of Virginia, by the bargainor, who was a non-resident, and therefore it fell within the express words of the statute, and was properly registered. We are therefore of opinion that the deed of bargain and sale from Hugh Montgomery and his wife, Euphemia, to Moses Austin, has been executed according to the forms of law, and passes the estate." 19, 456. *Montgomery v. Hobson.* 1838.

Retrospective Act to Cure Defective Probate Good.—REESE, J.: "The deed in this case was recorded in 1817 in 'the county of Lunenburgh, Va.,' and the clerk of that county, not giving a copy of the record of probate, certifies that it was duly approved according to law. This

probate, before our Registration [1]Act of 1838–1840, would have been held insufficient. It is good by the terms of that statute. But it is said that a certificate of probate which, before that statute, could not have been registered, can not now be received; that to permit it would give to the act an operation violative of the Constitution. To this proposition we are unable to yield our assent. Registration laws are founded upon reasons of public policy. By them it is intended that certain instruments evidencing a transfer of property shall be made known, and be subject to public inspection, and also that the proof of their existence shall be perpetuated. The solemnities of their execution and authentication may be as many, or as few, and of that precise character which the legislature may prescribe. The subject is within their competency. And whether their provisions relate to the future or the past, they affect the remedy and not the right." **21**, 594. *Hughes v. Cannon.* 1841.

Evidence.

Book, Etc., of Deceased Notary Public Admissible as Evidence—What Laws Not Retrospective.—The constitutionality of the [2]Act of 1820, ch. 25, providing that the book, or a sworn copy thereof, of a deceased notary public shall be *prima facie* evidence of the fact of notice, etc., in certain cases, was questioned as being retrospective. HAYWOOD, J., in deciding the case, said: "It is most perfectly correct, so far as it regards the construction of laws, that a retrospective operation shall not be given to them, unless the manifest meaning of the law be that it should have such operation; but where such meaning is plain, the will of the legislature should be conformed to in fixing the construction. When it is once determined that the law is manifestly retrospective, then, and not before, arises the question whether it be repugnant to the Constitution or not. Upon this point it might be sufficient to refer to two adjudicated cases; one in Overton's Reports, the other in the late opinion upon the indorsement laws; for these ought to settle the controversy, unless palpably erroneous, and then they ought to be rejected, as was done in the case of appeals from orders for roads, and from a practice in equity which had been established for several years at Knoxville two or three terms ago, and in several instances in modern times; but quitting hold upon these, and briefly considering the point upon principle, the result must be the same. . . . Does it mean all retrospective laws in general, or only some of a particular description, and if the latter, of what particular description? Not retrospective laws in general, for then no law could be made for the remuneration of past services, not even the members of assembly, their clerks and doorkeepers, at the end

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[1] Code 1858, 2084, 2086; T. & S., 2084, 2086; M. & V., 2898, 2900. See, also, **21**, 344; **28**, 547; **36**, 381; **34**, 513; **39**, 425; **41**, 414.

[2] H. & C., vol. 1, p. 234; Code 1858, 1801, 3787; T. & S., 1801, 3787; M. & V., 2472, 4536.

of each session of assembly. Nor could further time be given for the probate and registration of deeds, of which there never was any doubt from the first assembly after the formation of the Constitution to this day. Such probates and registrations have been sanctioned in a thousand instances by our courts of justice. Nor can it mean laws made for the preservation and establishment of just rights and titles, which have become imperfect and infirm by the non-observance of some legal ceremony; for these laws are not to take away rights, but to confirm and establish them.

"Laws for providing easier modes for proving deeds; for rewarding past services; for amending mistakes in grants and deeds; for giving verdicts in evidence instead of judgments; for legalizing marriage made under the Franklin government, and judgments and sales under its authority; and acts of limitation suspended during the time a war lasted; in such instances, the law is retrospective, but not unconstitutional; because, not such retrospective laws as this article of the Constitution prohibits. There are some retrospective laws which it does prohibit; *ex post facto* laws, for instance, and laws impairing the obligation of contracts; these are justly prohibited, because they destroy existing rights, not preserve them from destruction. If there be any other such laws which the Constitution prohibits, time and future emergencies will bring them to light; but to say in general all retrospective laws are void, is to introduce at one breath all the disorders which have been suppressed by the acts before mentioned, and by many others which are not at present particularly remembered; and to wrest from the legislature a power which has been hitherto exercised to the great benefit of the community, and for which, in various instances, complete and perfect justice could not be procured without the use of such laws, and is what this court, in my judgment, have not the right, and should not have the wish to do. Whenever a legal right did once exist, and is likely to be lost by some accident, omission, or imperfection, an act of the legislature may be interposed to prevent the loss, and to give stability to such rights. In such case no one is deprived of his property, but on the contrary, loss of property is obviated, and just and equitable rights which conscience sanctions are preserved. This the Constitution does not prohibit, constant usage justifies, and conscience requires. Far otherwise would it be if a contract were violated, or the property of one man taken and given to another." WHYTE, J., dissented, and BROWN, J., took time to advise. 7, 266. *Bell v. Perkins.* 1823.

Back Assessments.

Assessment of Omitted Property May be Made.—COOPER, J., held: "The property of a railroad company liable to taxation for years previous to the Act of 1875, which first created a State Board of Assessors for the assessment of such property, may be assessed under a subsequent act of the legislature expressly providing for its assessment for the taxes of those years." **82**, 56. *The State v. M. & C. R. R. Co.* 1884.

Undervaluation—Payment of Tax—Re-assessment.—The question here was the validity of the Act of 1887, ch. 2, sec. 24. LURTON, J.: "The assessment of property, omitted from the assessment made by the regular assessor, is expressly authorized by the Act of 1887. We have repeatedly sustained the validity of such assessments and the constitutionality of the acts authorizing them. . . . 'That part of the act which authorizes an additional assessment when the original assessment has been upon an inadequate valuation, is not new legislation. The same provision was contained in the Act of 1873, and a re-assessment made of the property of the Louisville & Nashville Railroad Company was sustained by this court as being authorized by that act.' . . . We do not see any constitutional objections to such legislation. The objection that the actual payment of the tax as originally assessed should preclude any further or additional assessment, does not go to the constitutionality of the act. The objection is not of serious import in any view of it." **87**, 414. [1]*Street Railroad Co. v. Morrow.* 1889.

Statutes Affecting Foreign Corporations.

Insurance Policies—Regulation of Liability—Act of 1893, Ch. 107, Sec. 1—Terms of Admission.—BEARD, J., held: "The court will not construe as retrospective, Acts of 1893, ch. 107, sec. 1, making void stipulations limiting liability on insurance policies to less than the full amount of loss, if that does not exceed the amount of insurance. The rule is well settled that the courts will give a statute prospective, and not retroactive force, unless the purpose that it should have the latter effect is expressed by clear and positive command, or it is to be inferred by necessary or unequivocal and unavoidable implication. Statutes can not be obnoxious to any constitutional objection which prescribe terms upon which foreign corporations shall enter the State, or which exclude them altogether." **95**, 248. [2]*Dugger v. Insurance Co.* 1895.

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[1] See same case, art. 2, sec. 28.

[2] See same case, art. 1, sec. 8, p. 44; also under U. S. Const., 14th Amend.

Laws Impairing Obligation of Contracts.[1]

Comity of States.

State and United States Constitutions.—Sneed, J.: "Whatever constitutes a good defense in the State where the contract is made or to be performed, is equally good in the State where the contract is litigated, with the important qualification that such defense is consistent with the paramount law of the land. The paramount law of the land in this country is the Constitution of the United States, and the law made in pursuance thereof, and the treaties made, or which shall be made, under the authority of the same, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding. Const. U. S., art. 6, sec. 2. And 'whether the State law is organic in its Constitution or any ordinance, or whether it be a statute, if it violate the Constitution, laws, or a treaty of the United States, it is simply void, and the courts of every State are bound by the supreme law, and not by the State law.' Marbury *v.* Madison, 1 Cr., 137; Calder *v.* Bull, 3 Dall., 386; Satterlie *v.* Wattison, 2 Pet., 380; *ex parte* Garland, 4 Wal., 399. The obligation of a contract can no more be impaired by the Constitution of a State than by an act of its legislature. Dodge *v.* Woolsey, 18 How. U. S., 331. And so it was held by this court that 'a convention of a State has no power to violate contracts more than an ordinary legislature.' If it had, there would be no safety in times of excitement, under our form of government, for the most sacred rights." **61**, 47. *Lewis v. Woodfolk.* 1872.

Statutes Providing Compensation for Improvements on Real Estate.

Improvements—Legal and Equitable Remedies—Legislature Presumed Not to Have Intentionally Violated the Constitution—Rules of Construction.—This was a suit at law to recover the value of improvements made by Townsend on land recovered by Shipp in an action of ejectment commenced in 1808. The improvements were surrendered in 1812. The verdict and judgment being against Townsend in the Circuit court, he obtained an appeal. The constitutionality of the [2]Acts of 1796, ch. 43, and 1805, ch. 42, was considered. Overton, J.: "As the case before the court is a suit at law, and not in equity, it remains to be considered how far these statutes are coincident with common law principles. The first act is in these words: 'That if any grantee or person claiming by deed of conveyance, founded on a grant, hath, by virtue thereof, obtained peaceable possession of any tract of land, and shall, at any time thereafter, be dispossessed by due course of law, or

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[1] For indirect or unimportant mention of this clause, see **11**, 354; **14**, 216; **39**, 416; **59**, 237; **65**, 531; **71**, 472.

[2] Hay. Rev., 247-372; H. & C., vol. 1, p. 49.

otherwise put out of possession, without his, her, or their consent, first had and obtained, that then, in that case, the person so dispossessed shall be entitled to recover at common law from the person to whose use the dispossession was so made the value of the improvements which he, she, or they have made on the said land.' The second act, being *in pari materia*, must be taken in connection with the first. It re-enacts the provisions contained in the first, and introduces two new ideas: First, that a person claiming under a lawful entry shall be entitled to compensation for improvements; secondly, that the value of the improvements shall be a lien on the land improved. In the interpretation of these acts, it is insisted on the part of the plaintiff that he is entitled to compensation for all improvements made previous to the time of eviction. In a waste and woodland country, as this is, the legislature must have designed to favor those who had opened land, and had contributed to clear the country of the encumbrances of forest timber. To give the acts a restrictive interpretation would discourage agriculture and the improvement of the country—two objects which the legislature evidently had in view.

"This interpretation involves fundamental principles of the highest concern to society in a free country. At this day it would be time misspent to descant at length on the principles of the Constitution and government under which we live. Let it suffice to observe that they secure to the honest and industrious the exclusive enjoyment of the fruits of that honesty and industry, and, in other words, the undisturbed use of their property. No man can be deprived of it but by his own consent, unless for public use, and not then without just compensation. These principles being inseparably interwoven in the frame and texture of our Constitution, can not be destroyed by a legislative act. In deference to the legislative authority, however, we never presume they designed to violate the Constitution nor the sacred rights of freemen. Any interpretation having this effect can not be admitted. The acts under consideration must be so interpreted as to steer clear of a violation of these constitutional principles. Where an act can have effect without obtruding on first principles, it is fair to give it that interpretation, because the legislature are never presumed to violate these principles where a meaning can be fixed to their expressions which would avoid such a conflict. . . . These acts must be so interpreted that they may stand with the principles of the Constitution. It seems to the court that, consistently with these principles, the remedial part of the act can not be extended any further than the ground on which courts of equity have, previous to this, acted. The general principles laid down in the acts were perfectly coincident, we believe, with the grounds of relief heretofore established by those courts. It is true the limitations or modifications of those which are recognized in equity

make no part of the act; they were too numerous to be delineated, or capable of definition if seen. We believe neither was the case in the nature of things; nor has it been usual, when legislating on general principles, to specify exceptions or modifications of those principles. Such things from the nature of legislation, which is conversant in generals and not particulars, are peculiarly the subject of judicial interpretation.

"Before the passage of these acts, any remedy which might have existed to recover the value of improvements was in a court of equity, and not at law. The acts are so far alterative that they afford a remedy at law where equity formerly afforded relief; but it can not at present be seen that a rational construction of those acts will enable us to go any further. At the same time it seems proper to remark that, as the act has made a legal subject of complaint out of an equitable one, it necessarily affords to the owner of the better title a legal defense on all the grounds on which he could have defended himself or opposed the claim of the improver in a court of equity." 3, 294. *Townsend v. Shipp's Heirs.* 1813.

In the above opinion the court did not refer to the Act of 1809, ch. 31, sec. 11, OVERTON, J., probably agreeing with counsel for appellees, that it could only apply to posterior cases. This act provided: "That where any person hath seated him, her, or themselves, on any spot of land, and hath entered the same with an intent to secure a title therefor, and said land had actually never been granted or surveyed at the time such entry was made, and afterwards was taken by an older entry, then and in such case the person so seated on said land shall be entitled to receive pay from the rightful owner thereof, to the value of his improvement."[1] The Act of October, 1813, ch. 24, provided: "That hereafter, when an action of ejectment shall be brought in any of the courts of this State, where the tenant in possession or defendant in such suit shall have color of title to the premises in dispute, or any part thereof, either by grant, deed of conveyance founded upon a grant, or entry for the same lying in any part of this State, or claim by occupancy and pre-emption south of French Broad and Holston," etc., that the defendant may give notice that he means to claim the value of his improvements on the trial; and that the lessor of the plaintiff may also give notice that he means to claim the amount of the mesne profits, "and it shall be the duty of said court upon the trial of such action of ejectment, to permit such defendant or tenant in possession to prove to the jury empaneled to try such ejectment, everything appertaining to the nature and value of his improvement on the land in dispute," etc., "provided that no improvement shall be taken into the valuation and allowed for, that shall have been made after the execution

[1] H. & C., vol. 2, p. 68.

of the original writ in such suit, or after the lessor or lessors of the plaintiff, his or their agent or attorney, shall have served said defendant or tenant in possession with a written notice that he or they claim title to the said land, specifying in the notice the nature of his claim; neither shall any mesne profits be valued and recovered, unless such as shall have occurred after the commencement of suit, or notice given as aforesaid."[1] It was on the Act of 1813 that the proceedings were based in the following case of Bristoe *v.* Evans and Campbell, decided in 1815.

Grant from the State — Compensation for Improvements — Rational Rule — Act to be Reconciled with Constitution if Possible — All Departments Bound by Constitution — Implied Repeal. — This was an ejectment suit in which plaintiff's offer of parol evidence to prove the value of his improvements was rejected because he had not shown such color of title as was contemplated by the act. Concerning the constitutionality of the Acts of 1796 and 1805, the Supreme court adhered to the opinion expressed in the preceding case, and with reference to the constitutionality of the Act of 1813, OVERTON, J., said: "In point of fact, courts presume that every act of the legislature is constitutional. In deference to the legislative organ of the government, this presumption necessarily arises. Legislators are under the same obligation to observe the provisions of the Constitution that is incumbent on this court. But so long as the judiciary is a separate and independent branch of the government, it must result that, if a legislative act should be plainly and obviously opposed to the Constitution, the judiciary is incapable of observing the injunctions of the law and disregarding the Constitution at the same time. One or the other must be dropped, and, as the Constitution is paramount to any law the legislature can make in opposition to it, the Court is left without any alternative. All the organs of the government are bound by the Constitution; it is the letter of attorney or authority under which all must act. So far as that authority is exceeded, the act is void; but this excess should be plain and obvious, for it is the duty of courts to reconcile the provisions of an act of the legislature, with the Constitution, if by any means it can be done. . . .

"It is objected to a recovery for improvements in this case, that the mode of obtaining redress pointed out in the Act of 1813, can not be observed without violating the Constitution. . . . It has been clearly shown that the method pointed out by the act might prove embarrassing and difficult in the extreme. . . . But this court disclaims any power of judging of the expediency of legislative acts. The power of the legislature is sovereign in this respect.

"The twentieth section of the Bill of Rights is the part of the Constitution principally relied on. . . . A grant from the State is a

[1] H. & C., vol. 1, p. 149, Code 1858, 3259, 3261; T. & S., 3259, 3261; M. & V., 3990, 3992.

contract between the State and grantee, 6 Cranch, 136, Fletcher *v.* Peck. It is a contract executed 'and contains obligations binding on the parties.' The State in parting with its interest engages that the grantee shall hold and enjoy the land granted in his own right, and as his own property, subject to such taxes and burdens as had been customary for the good of society before the formation of the Constitution. In the same case it is said, in page 135, 'it may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? The authority of Judge Patterson is to the same effect, and to be found in the case referred to at the bar by the defendant's counsel, 2 Dall., 310, where he observes 'that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man.' Therefore, any legislative act that impairs the obligation arising from the grant, that the grantee shall have the exclusive use and enjoyment of the property granted, subject to the limitations above mentioned, is unconstitutional and void. By this principle, which is believed to be a sound one, the Act of 1813 will be tested. Previously to the Constitution, and consequently to the passage of the act in question, the principles of equity afforded relief for improvements made on land by a person honestly acquiring it, believing the land to be his own. But he must have been a *bona fide* purchaser. His claim for improvements must be founded in the idea of unavoidable mistake arising from the usual perplexity of land titles. Kaims Prin. Eq., 104, 105, 106, and he must be a *bona fide* possessor.

"The idea that the State authorizes a man to make an entry in the surveyor's book for the land of another, knowing at the same time that such other person has a title to it; to make extensive improvements on the land, and under these circumstances sustain an action for the value of the improvements, is subversive of the clearest principles of natural right, in relation to property, and consequently of the Constitution, which guarantees to every man the exclusive use of his own property. The authority of the case of Shipp's heirs is decisive on this ground. Beside that case also decided, that without infringing the rights of property, the acts on the subject of improvements could not be carried any farther than the principles of equity had previously authorized. To go further would be impairing the obligation which the government had imposed on itself in granting the land, to protect the grantee in the exclusive use of the property granted. It hence results that the Act of 1813 must be construed on the same principles with those previously made on the same subject, and in such a manner as to avoid an infringement of the fundamental principles of society and of the Constitution.

That the legislature, under these fundamental restrictions, was competent to point out the mode in which the improver should seek redress, no one can doubt.

"In this view there can be no ground for the constitutional objection as it respects the first part of the act. It is the latter part, or that which falls within the proviso, which deserves more attentive consideration. Nor would it seem, upon a nearer view, that any doubt ought to exist respecting the constitutionality of all that part of the proviso which precedes the word 'neither' in the third line from the end of the first section. It does not follow because the legislature has said, 'that no improvement shall be taken into the valuation and allowed for, that shall have been made after the execution of the original writ or service of written notice of the plaintiff's claim,' etc., that allowance shall, under all possible circumstances, be made for all improvements before that time. That point is left as it was before the passage of the act.

"'Neither shall any mesne profits be valued and recovered unless such as shall have occurred after the commencement of the suit, or notice given as aforesaid.'

"To construe this sentence as an implied repeal of the antecedent law on the subject would be a manifest violation of the Constitution, by impairing the contract made with the State. The use and enjoyment of land consist in its profits or products. If one man use the property of another without his consent, he is bound to make compensation for it, and the State is under an obligation to afford the means of redress. In refusing redress, a man is deprived of his property without his consent, not for public purposes, and without compensation.

"Beside, the contract of the State in granting the land is impaired, by permitting one person to take possession of the land of another without his consent, and knowing it to be his property, and bring him in debt for such improvements as he may think proper to make. Thus a person may be indirectly deprived of his property without his own consent, and without compensation. It certainly could not have been the intention of this act to deprive the owner of any redress for mesne profits until he had given written notice of his claim. The government, before granting the land, had it marked out and set apart by metes and bounds. In contemplation of law a person's land is as clearly ascertained as his personal property. If a man take and detain my slave, can it be said the legislature is competent to pass a law, depriving me of all compensation for the injury I have sustained in the deprivation of the property, until written notice be given that the property is mine, or notice that compensation is meant to be claimed? If so, any other imaginable restriction can be imposed, leading to an entire deprivation of the property. When this property was granted, it became the property of the individual to whom it was granted, subject to such customary

taxes or demands as the good of society required. To impose new, and unheard-of restrictions in the use of this property would certainly be impairing the obligation of the contract arising from the grant. The Constitution secures me in the exclusive use of the property; how is this affected if the State making the grant can afterward tell an individual, 'You may make an entry for this man's land, settle on it, use it, and make expensive improvements at his cost without his consent, and he shall not only be bound to pay you the value of all improvements you may make, but he shall receive no compensation for the use of his land until he give you written notice of his claim, specifying the particulars thereof?' . . .

"The statute contains no express repeal of the former law, allowing compensation for mesne profits; the act does not necessarily repeal the law affording redress in such cases, and, as such repeal would seem to entrench on constitutional provisions in the use of property, I can not suppose the legislature intended such repeal, any more than it can be supposed that it intended the tenant in possession should, under all circumstances, be allowed for improvements previously to the time of the service of the writ or written notice. It is believed both these points are left in the same state as they were before the passage of the act. The act is constitutional and obligatory to the extent of its provisions, but, beyond that, does not operate as an implied repeal of antecedent remedies."

In considering the rule of evidence to be adopted for the recovery of compensation for improvements, the court said: "The rational rule, therefore, seems to be, not the price of labor, but the amount of increase in value of the land, produced by those improvements. This amount the real owner ought to pay, he being benefited to that amount. To adopt a different rule would be an obvious violation of the constitutional rights of property, which can not be presumed, in deference to the legislature. . . . It has been urged that the second section of the Act of 1813 is unconstitutional in preventing the lessor of the plaintiff from taking out a writ of possession after recovery until he shall deposit such sum of money as the jury may find against him for improvements. The court can not see it in this light. Before the passage of any act by the legislature on the subject, a court of equity would restrain the lessor in ejectment from taking possession until, by the perception of the rents and profits, he should have indemnified for the ameliorations. This is silent as to the accountability of the tenant in possession for rents and profits after the judgment; the law, therefore is left as it stood before, and he will be obliged to account. In this respect, therefore, so far from the act being unconstitutional, it is perfectly coincident with the principles of equity; those principles would compel a delivery of possession after the rents and profits shall have

indemnified the possessor to the full amount of his verdict and judgment." 2, 342. *Bristoe v. Evans and Campbell.* 1815.

Compensation for Improvements on Land Held Under Color of Title Allowed, Provided Value of Improvements Does Not Exceed Value of Rents and Profits.—GREEN, J.: "This action was brought to recover the value of improvements made upon the defendant's land. The defendant had the older and better title, and had recovered the land, in an action of ejectment, from the plaintiff, and also recovered $112 for rents and profits of the same land. The plaintiff had notice of the defendant's better title before he made the improvements for which this suit is brought. The judge charged the jury that the statutes allowing pay for improvements to those who are turned out of possession by an action of ejectment are unconstitutional. The subject of the constitutionality of these Acts of Assembly has been several times before this court, and, although they have been commented on very much at length, yet a definite and satisfactory adjudication has not been made. To say that the Act of 1805, ch. 42, shall be construed according to its literal import, and to give it effect to the whole extent that the legislature seem to have intended, would doubtless be to impair the obligation of the contract which the State makes with every grantee of land. If a party who is in possession of another man's land, under an entry which may have cost him but a few cents, can make whatever improvements he may choose, notwithstanding he may know of the existence of the better title, and, when turned out by an ejectment, may recover for the value of all such improvements, it is easy to see that he may in this way often become owner of the land as a compensation for his trespass upon it; and, although the legislature may not directly deprive the true owner of his land and give it to another, yet in this way they may do the same thing indirectly.

"It is not, however, now contended that this extended operation can be given to these acts, but that the legislature had the power to give the party an action at law for so much as he could before have obtained in a court of equity. This principle is undoubtedly correct, and is fully conceded by Judge Overton in Townsend *v.* Shipp's Heirs, and is not denied by Judge Whyte in Nelson *v.* Allen and Harris. The only difference of opinion in those two cases is as to the extent of relief a court of equity would give a party who has made improvements on another man's land. In the case of Townsend *v.* Shipp, the court held that, if one take possession of land under a title, believing the land to be his own, and under that belief makes improvements, equity would interpose in favor of such innocent possessor, and enjoins the claimant from taking possession until by the rents and profits the improver could compensate himself for his labor. This principle, Judge Whyte, in Nelson *v.* Allen and Harris, utterly repudiates, and insists that equity will

not sustain a bill for improvements by the occupant whether he have or have not notice of the true owner's title; that no case showing such a precedent can be found, and that the court, in Townsend *v.* Shipp, were in error upon this subject in following the civil law-writers, who, he says, are not authority in our law, but are cited only as an ornament to discourse, when they agree with the law. But Judge Whyte admits that courts of equity, in decreeing in favor of the owner for the rents and profits under special circumstances, will fix the time from which the account shall be taken so as to compensate the possessor for improvements. This, he says, is not on account of any meritorious claim in the possessor, but by way of subtraction from the plaintiff for neglect or default.

"Take this to be the true principle upon which a court of equity acts, and it would follow that, as the possessor would be entitled, under particular circumstances, to a diminution of the recovery for rents and profits, the legislature might give him an action to recover that directly which a court of equity would indirectly award. But, although we can not concur in the principle laid down by the court in Townsend *v.* Shipp, before referred to, to the whole extent there assumed, still we think the grounds assumed by Judge Whyte are too restricted. At the last term of this court, in the case of Jones and others *v.* Perry and others, 10 Yerg., it was determined that Perry and Wheeler should be entitled to such improvements as bettered the condition of the estate, provided the value thereof did not exceed the value of the rents and profits. Further than this we are not disposed to go, and, therefore, we are not of opinion that compensation for improvements beyond the value of the rents and profits can be recovered." 18, 478. *McKinley v. Holliday.* 1837.

Present Law on this Subject Resulting from Confusion in Decisions Above Quoted.—In a note to Bristoe *v.* Evans and Campbell, 2, 352, Mr. W. F. Cooper, afterward one of the judges of the Supreme court, in his edition of Tennessee Reports, says that the Acts of Assembly reviewed in this case were considered in Townsend *v.* Shipp's Heirs, Weatherford *v.* Bledsoe, 2, 392; Nelson *v.* Allen and Harris, 9, 361; McKinley *v.* Holliday, and in the argument of counsel, if not by the Court, in Jones' Heirs *v.* Perry. "After all which," says Mr. Cooper, "the language of Judge Green is very much to the point when he says: 'The subject of the constitutionality of these Acts of Assembly has been several times before this court, and, although they have been commented on very much at length, yet a definite and satisfactory adjudication has not been made.'

"The result seems to be," continues Mr. Cooper, "that the acts could not be sustained according to their literal import, and that their only effect was to transfer the remedy for the value of improvements to the

court of law, and that recovery could be had only for so much as before could have been obtained in a court of equity. Upon this view the Code has only retained the provision giving to the possessor in good faith, under color of title, the right to set off the value of permanent improvements, against rents and profits, leaving to the parties, all their other remedies at law or in equity. Code 1858, 3259, 3261; Avent *v.* Hord, **40**, 462."

In the case of Nelson *v.* Allen and Harris, referred to by Mr. Cooper as being one of the cases in which the constitutionality of these acts was reviewed, the constitutional question was not before the court for decision, according to Judge Catron and Mr. Cooper. Judge Whyte, in delivering the opinion of the court, did go into a very lengthy review of the acts and the previous decisions of the court, and said that the acts were unconstitutional (p. 385), but Judge Catron (p. 386) said: "The causes of Townsend *v.* Shipp, and Bristoe *v.* Evans and Campbell, I have no inclination to disturb; they having, as I think, however, no connection with the present cause; I see no reason for their examination or sanction. I wish to be understood as giving no opinion as to the correctness or incorrectness of the principles decided by the foregoing cases, because there is no controversy before us on the subject to which they relate, to wit: the value of improvements, and the examination of the constitutional question presented by them would be gratuitous in this cause."

Says Mr. Cooper in a foot note (p. 386): "The only point actually decided, or important to be noticed, is the one embodied in the head note, as to which both judges were in accord." Judge Whyte's *arguendo* is omitted from this volume, the object of which is to present only the opinions of the court; but his views should not be thrown aside as unimportant, for he seems to have helped cause the confusion which resulted in leaving out of the Code the provisions of the acts, as referred to by Mr. Cooper. See T. & S., 3259, 3261; M. & V., 3990, 3992.

In a note to Townsend *v.* Shipp's Heirs, **3**, 304, Mr. Cooper says that the result of these decisions is "that the acts in question only changed the forum of relief, without altering its extent."

School Lands and Funds.

Compact Between State and Federal Governments—History of Legislation on This Subject—Acts Directing Their Sale Void.—The legislature having, by resolution, requested the opinion of the court upon the power of the legislature to sell the school lands, the request was complied with in this case, CATRON, J., delivering the opinion. He said: "By the Act of 1825, ch. 85, the treasurers are instructed to sell the school lands. The complainants, . . . inhabitants of a township, filed this bill to prevent the sale. Tennessee acquired the land in controversy by the com-

pact of 1806. It is, in substance, a deed of conveyance; an executed contract, the obligation of which the legislature can not violate. Does the Act of 1825 violate this compact? This raises the question, had Tennessee communicated to her the power and authority to sell the school sections, and part with the legal and trust estate? The United States might well vest in Tennessee, as a corporate body, the legal title to the lands, and still restrain her from selling and conveying any part thereof. The contract itself must determine the nature of the title vested. To a correct understanding of the compact, much aid may be derived from the acts and policy of the Federal government in its disposition of the lands ceded to it by the States.

"In 1784 Virginia ceded to the United States her northwestern territory, now forming Ohio, Indiana, and Illinois, save a fraction owned by Connecticut. In 1785 Congress passed the first law making regulations to dispose of the public lands. They were directed to be laid off in townships of six miles square, and these to be subdivided into thirty-six sections of a mile square.

"Perhaps no act has ever been passed by Congress of equal probable influence upon the destinies of the American people. Upon it are based individual titles to a large portion of this continent, destined to become, a few generations hence, as mighty in men and means as any country of equal extent on the globe; and it has surface enough for a splendid empire. The distinguished patriots who were of the Congress of 1785 foresaw this; they foresaw the necessity that a people making the experiment of self-government must be educated, least their rights should ere long fall a sacrifice to the military usurper or profligate demagogue; that the idea of self-government for any length of time, by an illiterate mass of people, was not only improbable, but absurd; that illiterate men could not frame constitutions and laws to govern themselves by, or execute them when adopted; that they would not understand or appreciate them sufficiently for their preservation; nor would they have morals and elevation of character, the only basis of patriotism, to appreciate or preserve their freedom; that ignorance and depravity had been the handmaids to despotism through all ages past, and must be so through all ages to come; and that when this mighty republic should fall, mainly to this cause would be traced its overthrow.

"The Congress of 1785 was about to dispose of, and forever, the public domain, the population of which was presently to form a strong arm of the Union; a severance of this from off the body politic might, and in all probability would, destroy it. The main pillar of the political edifice (the means of education) was then in the power of Congress, and means, of all others the most permanent and most likely to prove beneficial through time to come, lands of good quality and convenient locality.

"From its paramount importance, a provision for the promotion of education became a part of the settled policy of the government in the disposition of public lands. By the Act of 1785 it is provided 'that there shall be reserved lot No. 16 of every township, for the maintenance of public schools within the township; also, one-third part of all gold, silver, lead, or copper mines to be sold or otherwise disposed of as Congress shall hereafter direct.' In the surveying and sale of all public lands the United States, from that time to this, have reserved the sixteenth section 'for the maintenance of public schools within the township.'

"In 1787, the justly-celebrated ordinance for the government of the northwestern territory was enacted by Congress. Amongst other things, it is declared 'that religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education, shall forever be encouraged in the territory.'

"In 1789 North Carolina passed the Cession Act, transferring to the United States what is now the State of Tennessee. This was accepted by Congress in 1790. The fourth condition stipulates that the people of the ceded territory shall enjoy all the privileges, benefits, and advantages set forth in the ordinance for the government of the northwestern territory of the United States; that Congress shall never bar or deprive them, or any of them, of privileges which the people in the territory west of the Ohio enjoy.

"Every promise set forth in the ordinance was part of our contract with the United States; one of these was, that schools and the means of education should be forever encouraged; not by words, but by useful means. We were to receive all the privileges and benefits the people northwest of the Ohio enjoyed. What did they enjoy? The sixteenth section of every township for the use of public schools, within the township. Thus the United States were bound, by contract, to furnish us the means of education, and that forever, and to reserve the sixteenth section for the use of public schools within each township. Upon this consideration, with others, did North Carolina part with the soil and sovereignty of the country. Suppose she had sold to individuals, would not a court of chancery have enforced this part of the contract in favor of the *cestui que* trust, the people of the ceded territory? It can not be denied.

"Thus stood the rights of our people, and their claim upon the United States in 1806. By the compact of that year, to which the United States, Tennessee, and North Carolina were parties, amongst other things, it was agreed that the legal title to the lands northeast of a certain line be vested in the State of Tennessee; that 100,000 acres should be laid off in one tract, south of French Broad and Holston, for the use of two colleges to be established by the legislature; also 100,000 acres in one other tract, for the use of academies, one in each county,

to be established by the legislature. These lands, it was stipulated, should be subject to the disposition of the legislature of the State, but should not be granted or sold for less than two dollars per acre. 'The proceeds of the sales shall be vested in funds for the respective uses aforesaid forever,' says the compact.

"And the State of Tennessee shall, moreover, in issuing grants and perfecting titles, locate six hundred and forty acres to every six miles square in the territory hereby ceded, where existing claims will allow the same, which shall be appropriated for the use of schools, for the instruction of children forever.

"The United States held the legal title to the lands referred to, subject to the stipulations of the Cession Act of 1789; they were bound, so far as a sovereignty can be bound, to furnish the means of education, and forever; they were bound to furnish the sixteenth section, for the maintenance of public schools within the township.

"Thus incumbered, the legal title was vested in the State of Tennessee, with this positive further restriction, that Tennessee should locate one section in every township, if so much ungranted land might be found therein, for the use of schools, for the instruction of children forever. The first duty of Tennessee was to elect the school section, if so much ungranted land was found in the township; when elected, it was holden by the State in her corporate capacity, not to sell (Congress never communicated the power of alienation of the school sections), but to locate and hold in trust the land, and, as such trustee, to cause to be appropriated the land and the rents, issues and profits thereof, for the use of schools for the instruction of children forever, through all ages to come, whilst her corporate capacity endured.

"Such is the plain language of the act; such is the undoubted inference to be drawn from the context provision, authorizing the sale of the college and academy lands; such is the conclusion to be drawn from the obligation resting upon the United States by force of the Cession Act of 1789; such is the conclusion to be drawn from the construction given to the compact of 1806 by the legislature of Tennessee, from 1806 up to 1825. For near twenty years it was not imagined the school sections could be sold.

"In 1817 the legislature ordered formal grants to be made out for the school sections, reciting that in conformity to the compact of 1806, 'there is granted by the State of Tennessee, for the use of schools for the instruction of children, a tract of land situate, etc., which grant shall be sealed with the great seal of the State, shall be recorded by the register in the same manner as other grants issued by the State are, and shall be as effectual to vest the title to said lands for the use of schools forever, against any grant issued by the State of Tennessee.'

"As evidence of the nature of the trust reposed in Tennessee by the compact, and as evidence of the particular sections elected for the use of schools, no declaration could be more conclusive than the patent. It may vest in the inhabitants of each township, for which the land was located, a title in fee, not subject to be defeated by the legislature. That it was intended to do so, there can be little doubt. On this point, however, we wish not to be understood as giving any matured opinion. It is not probable the State intended to part with her powers over the school lands as trustee, nor do we imagine she has done so by the Act of 1817. It is a public matter, and must be subject to legislative control.

"We are of opinion that the Act of 1825 clearly violates the obligations of the compact of 1806 imposed upon the State of Tennessee; and that the act, so far as it orders the school sections to be divided, sold and granted to purchasers, is unconstitutional and void. We therefore reverse the decree, overrule the demurrer, and remand the cause to the Chancery court to be proceeded in." **10**, 537. *Lowry v. Francis.* 1831.

Sale of School Lands Previously Leased is Unauthorized by Law.—CARUTHERS, J., held: "A sale of school lands previously leased is unauthorized by law, and the sale is void; and this is so, although the lease itself may be a nullity. By the Act of 1843, ch. 356, Congress authorized the State, upon certain conditions, to sell the school lands. The legislature, by the Act of 1844, ch. 104, amended by the Act of 1846, ch. 121, in pursuance of the power given by Congress, made provision for the sale of these lands. Under these acts certain school lands in Polk county were sold, and the sale confirmed; but before the sale was made, the school commissioners, under the Act of 1850, leased said lands for ninety-nine years. The sale was void, and communicated no title to the purchaser." **38**, 173. [1]*Goodman et al. v. Tennessee Mining Co.* 1858.

Common School Fund.—NICHOLSON, J.: "When the common school[1] fund was placed in the bank to constitute part of its capital, it became assets of the bank, to which the creditors of the bank had a right to look, and that these constituted a trust fund applicable to the payment of the debts of the bank. The Act of the Legislature of 1866, which appropriated the assets of the bank as school fund, impaired the obligation of the contract between the bank and its creditors, and was, therefore, null and void—as was also the assignment made in pursuance of that act, so far as it gave preference to the school fund." **64**, 6, [2]*State and Watson v. Bank of Tennessee.* 1875.

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[1] See **31**, 87.

[2] See same case, art. 11, sec. 12.

Judgments and Judicial Proceedings.

Legal Tender Clause of U. S. Constitution — Conditions that Led to its Adoption — Payment of Judgments in Bank Notes — Ex Post Facto Laws — Legislature Can Not Suspend Execution — May Alter Remedies. — The Act of 1819, ch. 19, sec. 1, directed that "no execution shall issue upon a judgment until two years after its rendition, unless the plaintiff shall endorse upon the execution that the sheriff may receive in satisfaction the notes of" certain banks. In this case it was contended that this act was in conflict with the Constitution of the United States, art. 1, sec. 10, as follows: "No State shall emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any . . . *ex post facto* law, or law impairing the obligation of contracts . . . and that it was in conflict with the above clause of our State Constitution. In delivering the opinion of the court, [1]Judge HAYWOOD, after reviewing at length the history of paper money and tender laws under the colonial governments, and the disastrous condition of the country resulting from the States continuing to issue paper money after the close of the revolutionary war, said:

"Such were the unpromising circumstances which America had to deplore, and such the alarming disorders which were to be remedied by the convention. One of the most powerful remedies was the tenth clause of the first article, and particularly the two sentences which we are now considering. They operated most efficaciously. The new course of thinking, which had been inspired by the adoption of a Constitution that was understood to prohibit all laws for the emission of paper money, and for the making anything a tender but gold and silver, restored the confidence which was so essential to the internal prosperity of nations." . . .

"These clauses, as they were not only necessary for the regulation of intercourse between State and State, and the citizens of each, to prevent the misunderstandings which were likely to arise from the prohibited causes, are equally so for regulating the intercourse of citizens of the same State with each other, were therefore considered as a fundamental law of the Union, and also a part of the Constitution of each State. What was it to the State of Vermont if Georgia should pass an *ex post facto* law or bill of attainder which could operate only upon those within her own territory? The restriction was imposed upon Georgia, not for the sake of the people of Vermont, but for the benefit

[1] ORIGINAL NOTE OF REPORTER.—"Judge Whyte did not express an opinion when the above was delivered, but like motions having been made in the Supreme court of Charlotte, that judge said he considered the question as settled, and joined in the orders. Subsequently, when Judges Brown and Peck came to the bench, they uniformly, on sundry motions to the same effect, concurred in the above opinion: so that the expression of five judges on the bench of the Supreme court has been in accordance with this opinion." EMMERSON, J., concurred with HAYWOOD, J., on all the points in this case.

of Georgia, and for fear of the tyranny which her own legislature, at some future time, might be tempted to exercise. A law, impairing the obligation of contracts, as it was equally injurious to citizens of the same State as to foreigners and citizens of other States, is equally prohibited as to all, and is not restrictive of State legislation only so far as regards citizens of other States. The Constitutions of the several States had left the power unlimited in their State legislatures. The framers of the Federal Constitution believed it to be of indispensable importance not to leave this power any longer in the hands of the State legislatures. Experience had demonstrated the baneful effects of its exercise. The known disposition of man excluded the hope that it would not be used for the same pernicious purposes in future. Under the smart of this experience, such were the feelings of the American people at the time, still suffering under repeated emissions of depreciated paper, that not a dissenting voice was raised against the clause before us. No State required it to be expunged, nor did any State propose an amendment. . . .

"If the Constitution and laws of the Union make void such acts of the legislature, and we deem them valid, the debtor in this State will be bound to pay gold and silver to his creditor who lives out of the State; when, at the same time, his debtor within the State, who owes an equal amount, will pay in depreciated paper, perhaps of not half the value; and thus one debtor residing within the State will be ruined by the legalized unfaithfulness of another. And in our State courts the same words in the same clause mean one thing, but in the Federal court another. When part of the citizens are thus sacrificed to suit the convenience of another part, and when such sacrifices become habitual by the frequent exercise of a power which never lies dormant, after the acknowledgement of its existence, it will not be long before the persecuted portion will seek exemption from the wrongs it endures. Such are the tendencies which the convention meant to eradicate. Acts generative of such tendencies are adverse to the spirit of this clause, and there is a repugnance between them and the Constitution.

"We come now to a more minute examination of the acts in question. The creditor is denied execution for two years, unless he agrees to take paper. What the debtor can not tender, the creditor is not bound to receive. Whatever he is not bound to receive he can not be punished for refusing. The accessory is prohibited as well as the principal. Here the tender is not directly sanctioned. It is only said to the creditor, If you will not take paper, give up the means of getting anything at all for two years, with the prospect of still longer delay by repeated acts of the legislature. Take this paper which I have no right to impose upon you, or give up a right which I have no authority to take from you. Suspension of execution is a penalty, if, but for the

act, the creditor would be entitled to it as a right attached to his antecedent contract; and it is a penalty prohibited by the tenth section now under consideration. If the legislature has power at this day to enact a suspension of execution for refusing to take paper, that section is abrogated. Two years may be extended to a hundred, and where is the difference between a direct injunction to take paper and the injunction to wait one hundred years, if he will not take it? Grant, for argument sake, that the right to execution is not an antecedent right attached to the contract, but a newly-created one, given by the legislature only upon condition, shall it be permitted so to frame the condition as to make it involve the relinquishment of a right secured by the Constitution? By the latter the creditor is secured against paper money. Can he be required to relinquish that security in order that he may become entitled to the benefit of this new-created right, to have execution? By such inventions every constitutional right may in succession be bartered away. Constitutional rights are vested, unexchangeable, and unalienable. They belong to posterity as well as to the present generation. We may use and enjoy, but not transfer them; and every such condition is utterly void. If execution can be suspended on any condition, then the legislature has an absolute power to suspend it forever. How easy it is to invent a thousand conditions, with which no man in his senses would comply! If the right is newly created and the condition void, it must vest without the performance of the condition; and the result is, that if the right be antecedent, suspension is an unconstitutional penalty; if it be newly created, the condition is unconstitutional, and the right vests absolutely. In either alternative, the indorsement need not be made.

"This conclusion follows upon a correct interpretation of the clause prohibiting tender laws. It equally follows a just interpretation of the sentence prohibiting laws to impair the obligation of contracts. . . . A grant made by the State, being an executed contract, can not be revoked by the legislature if pursuant to a law made by themselves; this point is so decided in Fletcher *v.* Peck. With respect to executory contracts, it will be admitted without controversy that the terms and conditions of them can not be in any respect altered or interfered with by the legislature.

"The time, place, person, or thing to be done, can not be changed by act of assembly. Covenants, sometimes by *ex post facto* circumstances, become unreasonably burdensome. He that covenants to pay rent for premises he never enjoys by the accidental burning of them, must nevertheless pay the rent. A man agrees to perform a voyage by sea under a penalty by way of stated damages for non-compliance, and he is hindered from an exact compliance by adverse winds, still he must pay the penalty. In these and all other cases of contract, the legis-

lature can not interfere to make them more just or reasonable than the parties have made them. For thus no contract could be made that the parties might depend on for fear of the new modeling interposition of the legislature. Thus far is plain; but still the question remains, is the suspension of execution within the prohibition? Does an act to suspend execution impair the obligation of contracts made before it? What the obligation of a contract is may be discerned by considering what it is that makes the obligation. The contract alone has not any legal obligation, and why? Because there is no law to enforce it. The contract is made by the parties, and, if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declare that there shall not be a specific execution, the obligation of the contract is lessened and impaired. If the law in being at the date of the contract give an equivalent in money, and a subsequent law say the equivalent should not be in money, such act would impair the obligation of the contract. If the law in being at the date of the contract give immediate execution on the rendition of the judgment, a subsequent act, declaring that the execution should not issue for two years, would lessen or impair, the contract equally as much in principle as if it suspended execution forever; in which latter case the legal obligation of the contract would be wholly extinguished. The legislature may alter remedies; but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in being when the contract was made, if such alteration be the direct and special object of the legislature, apparent in an act made for the purpose. Though, possibly, if such alteration were the consequence of a general law, and merely incidental to it, which law had not the alteration for its object, it might not be subject to the imputation of constitutional repugnance. The legislature may regulate contracts of all sorts, but the regulation must be before, not after, the time when the contracts are made. . . .

"Suspension of execution as directed by these acts of the legislature under consideration is forbidden by the prohibition of tender laws as a direct consequence of the prohibition; also by the interdiction to pass laws impairing the obligation of contracts, suspension of execution being on impairing of such obligation." 7, 9. [1] *Townsend v. Townsend et al.* 1821.

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[1] See same case, art. 1, sec. 8, p. 45; art. 1, sec. 17, p. 113; and art. 1, sec. 20, p. 147.

Surety for Costs—Discharge by the Court—Substituting Another—Competency as a Witness.—TURLEY, J.: "The first cause of error assigned in this cause is that James P. Clark, who was original surety for the prosecution of the suit, was discharged by the court, and other surety taken in his stead, and he permitted to be examined as a witness. It is said that the court had not power to release him from his liability incurred as surety for costs, and that he was therefore interested in the event of the suit and an incompetent witness. We do not think so. Surety for the prosecution of suits, appeals, and bail are taken by the officers of court under the provisions of the law, and it has always been the practice in this State, upon a proper case made out, to substitute other security in the place of the original; and, this being done under the inspection of the court, no harm can be done to the person for whose use the surety was given, as the court will be careful to take none but what is amply sufficient to secure the end designed. The exercise of this power is not a violation of the obligation of contracts under the provision of the Constitutions of the United States and the State of Tennessee. For there is no contract on the part of the person intended to be benefited by taking the surety. The law takes the surety to protect him from loss, and he has no right to ask more at the hands of the court than that this shall be done; he has acquired no right by a contract to hold any particular person liable, provided the court will substitute another who can equally protect him from loss. This question has been thus adjudicated in England and all the States of the Union where it seems to have been made; at least we have not been able to find an authority to the contrary." **19**, 205. *Craighead v. The State Bank.* 1838.

Bond to Appear at Court—Change of Term by the Legislature.—GREEN, J., held: "The legislature has no power to extend the terms of the defendant's contract beyond the obligation he entered into when he made the contract. Thus where a recognizance is conditioned for the defendant's appearance at a particular term, and the legislature abolishes that term, and directs that the court shall be held at a subsequent term, the recognizance is discharged." **23**, 227. [1]*The State v. Edwards.* 1841.

This Provision Made in Light of Certain Principles of Law—Act Providing Stay of Execution on Judgments and Decrees Previously Rendered—Binding Force of Contracts—Remedies—Case Overruled: Farnsworth v. Vance et al.—The Act of January 6, 1861, providing for a stay of execution on all judgments and decrees in courts of record and before justices of the peace, was before the court on the question of its constitutionality. It was decided that the act impaired the obligation of contracts entered into before its enactment, and was therefore uncon-

[1] See Meigs' Digest, vol. 2, p. 890; **32**, 309. But see now T. & S., 5155; M. & V., 5985, and **37**, 419.

stitutional. FREEMAN, J., with reference to the obligation of a contract, said: "Its binding force can neither be created, nor enlarged, nor modified by laws passed by a legislature or any other power in a State; nor can it be released or broken, though it may be violated. It must remain eternally the same in its original and essential force. The framers of the Constitution did not intend to prohibit the States in this direction, or add additional strength to this element of the obligation by protecting it from laws that might weaken its force. It must be the other element of obligation that is the *legal* compulsion or *obligement* that grows out of a contract and makes a part of it, enters into it at the time it is made, that is intended to be protected and maintained in its full force and vigor by this language.

"This is made certain by another view of the question, that the prohibition is against any State passing any law impairing the obligation of contracts. It is the action of law-making bodies that is thus restrained, and that of States. The law-making bodies of States, or law-enacting bodies, are the people in convention, or in legislative assemblies, and it is these bodies that are prohibited in the exercise of their functions to pass or enact laws, the one in the form of constitutional provisions, the other in the form of statutes or legislative enactments in the direction forbidden. It would seem clear then, that the prohibition being upon legislative or law-making bodies, that it should be referred to that which, without the prohibition, they were competent to do, and was within their legitimate sphere of action, that is, the impairing by law of an obligation created or imposed by law; or in other words, to affect injuriously the legal obligation or legal compulsion or *obligement* that makes a part of every contract.

"This, we think, is the principle that underlies the reasonings of the Supreme court of the United States in the great leading cases, on this subject, of Sturgis *v.* Crowninshield, 4 Wheat., and of Ogden *v.* Saunders, 12 Wheat., 132; for, in the first case, Chief Justice Marshall, in delivering the opinion of the court, says, p. 197: 'A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract.' That is, we add, it is the legal obligation with which the law-making power and the courts have to deal. He adds: 'Where a party has given his promissory note, by which he promises to pay a sum of money on a certain day, the contract binds him to pay that sum on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it.' Here in this last sentence the learned chief justice (with deference be it said) seems to fail to distinguish between the moral and legal obligation; for while the party is certainly morally bound to perform it on that day, and while the law equally recognizes

the duty, it does not actually, by any of its machinery, oblige him to do so on that day, nor is there any legal *obligement* or compulsion on him to do so, but only the right to bring a suit and have judgment in the future, and an execution to enforce the performance by sale of property for that purpose.

"We assume that the convention had this principle and view of the case in their minds when they framed this clause; that they were thoroughly acquainted with our common law and knew its machinery for the enforcement of contracts, and meant that the legal obligation of contracts — that is, the legal means of enforcing them, which constituted their legal obligation, or the legal obligement by which they were enforced — should not be impaired or weakened, or rendered less effective, than when the contract was entered into and the obligation imposed or taken upon the party."

After quoting at length from the opinion of Judge Washington in the case of Ogden *v.* Saunders, 12 Wheat., 239, Judge Freeman says: "We turn for a moment to the decisions of our own courts, where the same views were at an early day adopted, and presented in an opinion of great ability in the case of Townsend *v.* Townsend. The court in that case hold the principle to be in substance: 'That the legislature may alter remedies, but they must not, so far as regards antecedent contracts, be rendered less effective or more dilatory than those ordained by the law in being when the contract was made, if such end be the direct and special object of the legislature apparent in an act for the purpose.' . . . Such was the uniform holding of our courts until the case of Farnsworth and Reeves *v.* Vance and Fleming. That case goes on the principle, 'that the legislature may, in their discretion, vary the nature and extent of the remedy so that always some substantive remedy in fact be left' (2 Col., 117), but leaves out the important qualification that it shall be equally efficacious as the one in existence at the time of making the contract.

"We think perhaps the true principle is more properly stated thus: That the legislature have complete control over the form of the remedy, the mode of proceeding by which the legal obligation is enforced; and in all that pertains to this may alter, change, or modify its laws as discretion may dictate. For instance, where the existent remedy at the time was debt, it may change it to *assumpsit;* or if *assumpsit*, may change it to debt; or, as in our Code, may give an action simply on the facts of the case; but then in no case can it by direct enactment for that purpose, nor even by indirection, where such is the purpose, render the remedy essentially less effective for enforcement of the obligation to which the party has bound himself by his agreement.

"If the legislature can enlarge the time one day in which the party is to perform what the legal obligation of his contract requires at the

time it is entered into, it may do it for a hundred days; and if for this period, then it may equally well do it for a hundred years. There can be no difference in principle in the one case from that of the other; and thus the legal obligation is not only impaired, but practically destroyed. Can this tremendous power be fairly held to lurk within the principle of legislative power over the remedy for enforcement of a contract? We think not. . . . We can not approve the reasoning or conclusions of that case, (Farnsworth *v.* Vance), and overrule it, adopting what we think was the uniform current of judicial opinion in Tennessee before that case, as the sounder rule." **53**, 97. *Webster v. Mann and Rose.* 1871.

Act for Relief of Debtors—Remedies—Power of the Legislature to Alter.—NICHOLSON, J.: "The Act of 1861, ch. 2, is entitled 'An act prescribing the remedy for the collection of debts and relief of the people.' It expired by its own limitation, on the 1st day of July, 1862. The general object of the act was to stay the collection of all judgments, rendered by courts or justices, for definite periods, upon new or additional securities to be given by judgment debtors. The conclusion of the third section provides as follows: 'In order to constitute the levy on real estate valid as to proceedings before a justice of the peace, the execution shall be registered in the register's office of the county where the land lies.' The circuit judge (Elijah Walker) held this provision to be unconstitutional, as it obstructed and embarrassed the creditor's remedy, which existed by law, at the time his judgment was rendered. . . . The judgment in the present case had been rendered before the passage of the Act of 1861. At that time, the judgment creditor had the right, under the law, to have his execution levied on the debtor's land, and thereby to secure a lien which could be rendered available by returning the paper to the Circuit court, and procuring an order of sale. The Act of 1861 undertook to change this remedy, by requiring the execution, when levied, to be registered, and thereby securing the lien, but making no provision for enforcing this lien. It was manifestly intended as an act for the relief of debtors, by giving time on judgments rendered against them. There was, therefore, no error in the holding of the circuit judge." **63**, 521. *McClain v. Easley.* 1874.

Vested Rights—Liabilities—Remedies.

Deeds of Trust Made Before Passage of Act—Future Contracts—Remedy.—In September, 1850, plaintiff purchased from McCombs, trustee, the house and lot in question, recovered a judgment in an action of ejectment against defendant, and was put in possession of the property in February, 1852. In April, 1852, this suit for mesne profits was instituted. In August, 1852, the defendant redeemed the property from

said sale, according to the [1]Acts of Assembly, 1820, ch. 11, sec. 2, and 1823, ch. 24, sec. 2. The question was whether plaintiff was entitled to mesne profits. . . . TOTTEN, J.: "For the defendant it is urged that the Act of February, 1850, ch. 121, applies to the case, and that under its provisions the defendant is not liable for mesne profits. It declares 'that in all sales of land or real estate hereafter to be made under execution or deed of trust, which by existing law is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, the debtor shall not be liable for rent from the date of the sale to the time of redemption; and if the purchaser, or his assignee, shall take possession under his purchase, upon the redemption by the debtor, he shall be entitled to a credit for the fair rent of the premises during the time they were in the possession of the purchaser.' Now, the sale was after this act became a law, and there is no question but that it expressly applies to the case. But the deed of trust, by virtue of which the sale was made, was an existing contract when the law was passed, it having been executed before that time. And it is argued by the plaintiff's counsel that the law operates upon the contract; that it impairs its obligation and effect, and that it is, therefore, repugnant to the Constitution of the United States, which provides that no law impairing the obligation of contracts shall be made. To illustrate and support this position numerous cases are cited. Benson *v.* Kinnie, 1 How., 311; Gaity's Lessee *v.* Ewing, 3 Id., 716; Pool *v.* Young, 7 Mon., 587; Townsend *v.* Townsend.

"As to existing contracts, it is a settled doctrine that the legislature has power over the remedy, but no power over the contract. That is secured and protected under the sanction of the Constitution. . . . This law takes from the purchaser a right and benefit which he had before, and confers upon the debtor a right and benefit which he had not before, under the mortgage. The use, the rents and profits for the two years limited for the redemption are taken from the purchaser and given to the debtor. The effect, then, is to reduce the value of the estate to the purchaser—that is, to reduce the value of the estate in market, and of course reduce the fund its sale will produce, which fund is the only thing in which the creditor has a beneficial interest under the mortgage. The contract is, therefore, impaired to this extent, to the prejudice of the creditor, and if the estate be, as it often is, an inadequate security for the debt, it is a positive loss to the creditor to the extent of the value thus taken from the purchaser and given to the debtor. It is no answer to say that the purchaser takes the estate in view of the law. That is true. But as he takes a less interest, he will give less for it, and it is in this diminution of the fund that the security is impaired and the creditor injured. The contract is to be

[1] Code 1858, 2135; T. & S., 2135; M. & V., 2958.

construed by the laws existing at the time it was executed, and not by the laws made after its execution. Those laws that give force and effect to the contract are incorporated in it and form part of it. Thus, the right to redeem is not stated in the deed; that provision is supplied by the law applicable to such contract. But subsequent legislation can never be permitted, without gross violation of reason and common right, to interpolate terms and provisions on the contracts of parties to which they did not consent. As to the remedy, we do not perceive that this law has any effect upon it. The *procedure* is the same, the mode of sale is the same, but it is the effect of the sale that is not the same. We are of opinion, then, that this law 'impairs the obligation of the contract' in question; and being, therefore, repugnant to the Constitution, the law must be held and deemed inoperative as to the said contract. The sale under the mortgage must be construed to have the same force and effect, as to the rents and profits, as if the law had not been made. As to mortgages and deeds of trust made since the law was passed, they will be construed and governed by it. For there is no question as to the power of the State to declare the force and effect of future contracts made and to be executed in it. This is an unrestricted legislative power, to be exercised at discretion for the public advantage. The restriction is limited to contracts existing at the time the law is passed; as to them, they are protected by the Constitution, and can not in any degree be violated or impaired." **33**, 549. *Greenfield v. Dorris.* 1853.

Suit Brought Against the State Under One Statute Not Affected By Subsequent Statute.—School lands, held in trust by the State under an Act of Congress, having been sold under a law subsequently declared unconstitutional and void by the courts, the legislature authorized suit to be brought against the treasurer of the State for the purpose of ascertaining the rents and profits of the land and interest thereupon, and suit was brought accordingly, after which the legislature enacted that the claimants should recover under the previous act "the amount received by the State for the rents of said land, and no more." TURLEY, J., held: "The last act would not affect the recovery under the previous act." **26**, 114. *School Commissioners v. The State.* 1846.

Laws Exempting Property.—BURTON, Sp. J., held: "Laws extending the exemption of property from levy and sale under executions against the owner can not affect existing contracts." **61**, 148. [1]*Harris v. Austell.* 1872.

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[1] Meigs' Digest, vol. 2, p. 890. See Hannum *v.* McInturff, art. 11, sec. 11; also, **66**, 384; 1 Leg. Rep., 37 and 334.

Public Printer a Public Officer — Legislature May Discontinue Office — Repeal as Affecting Rights.—On March 21, 1873, an act was passed by the legislature repealing those provisions of the Code which created the office of public printer, and providing for his election, but with a proviso that "this act shall in no way affect the rights and duties of the present public printers." Afterwards, an act, taking immediate effect, was passed, authorizing the Secretary of State, etc., to award the public printing to the lowest bidder, etc. On March 25, 1873, an act was passed requiring the assessor to furnish tax lists to certain persons, and making it the duty of the comptroller to furnish the clerks of the County courts the printed forms for listing, to be distributed by the clerks to the assessors, etc. NICHOLSON, J., held: "The public printer is an officer of the State, but since the contracts designed to be protected by sec. 10 of the first article of the Constitution are contracts by which perfect rights, certain, definite, fixed, private rights of property are vested, it follows that Jones, Purvis & Co. held the office of public printers as a public trust, subject to the power of the legislature to discontinue it at any time, or to be resigned at their pleasure at any time by them, and not as a contract protected from impairment under the Constitution of the United States. From the date of the repealing act they ceased to be officers of the State, and could claim no rights accruing after the date of the repealing act. The repeal, however, could not affect any rights which had vested before their office was abolished. These would be protected by the Constitution of the United States, and these are the only rights intended to be protected by the proviso to the second section of the repealing act." **63**, 113. *Jones, Purvis & Co. v. Hobbs et al.* 1874.

Corporations — Statute Construing Void Charter.—The question here was the validity of the Acts of 1890 (ex. sess.), ch. 17. CALDWELL, J., held: "A statute curing a defective acknowledgment that rendered a corporate charter void, and thereby defeating an existing liability of the corporators under the contract of the company, does not impair any contract obligation of the other parties to the contract. . . . A law which facilitates the intention of the parties to a contract by removing its invalidity does not impair any vested right." WILKES, J., dissented. **94**, 123. *Shields v. Clifton Hill Land Co.* 1894.

Divorce—Right to Property Acquired by Marriage.—CATRON, J., held: "While the legislature exercised the power of granting divorces, its acts of separation could not divest the parties of the rights to property acquired by the marriage. So, the wife was entitled to alimony after such separation, just as she would have been had the separation been decreed by a judicial sentence." **16**, 67. [1]*Richardson v. Wilson.* 1835.

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[1] **18**, 200, Wilson *v.* Wilson. 1836. Meigs' Digest, vol. 2, p. 890.

Act of 1831 Abolishing Imprisonment for Debt.—TURLEY, J., held: "The right to imprison a debtor is no part of the contract, and an act of the legislature abolishing the use of the writ of *capias satisfaciendum* is constitutional and valid." **23**, 14. *Woodfin v. Hooper.* 1843.

Taxes—Payment in Paper Not Legal Tender—Bank of Tennessee—Agreement to Receive Paper in Payment of Taxes Due the State—Section 28 of Charter a Contract With State.—DAVIS, J., held: "A State may, in the charter creating a bank, agree to receive the paper of the bank for all taxes due the State. Such a contract is binding on the State, and within the protection of the Constitution of the United States. Courts do not favor repeals by implication, and never sanction them if the two acts can stand together. The State had the right at any time to withdraw its guaranty, but it must be done in such a manner as not to impair the obligation of its contract with the noteholders of the bank. The guaranty attached to the paper itself, and could not be withdrawn from it; and notes in circulation at the time of the repeal of the act are not affected by it, and carry with them the pledge of the State to be received in payment of taxes by every *bona fide* holder. Section 28 of the charter of the Bank of Tennessee, constituted a contract with the holders of the notes of the bank, and it was not in the constitutional power of the legislature to repeal the section so as to affect the notes which, at the time, were in circulation." **75**, U. S., 44–64. *Furman, Green & Co. v. Nichol, Clerk.* 1869.

Obligation of Contract—Not Impaired by Laws Prohibiting Receipt of New Issue Bank of Tennessee Notes for Taxes.—NICHOLSON, J., held: "There is no obligation on the part of the present State government to receive the notes of the bank issued after the inauguration of the rebel State government in payment of taxes due to the State. For, although as between the bank and the holders, these notes are valid and protected from impairment through hostile State legislation, by the Federal Constitution, yet section 12 could only have been operative upon the bills or notes emitted during the existence of the illegal State government through the re-enactment or tacit recognition thereof, by such State government, which had no power to commit the State to the terms of the contract imposed thereby for a period longer than its own existence. It was therefore competent for the restored State government to repudiate these notes, so far as its liability to take them for taxes was concerned, the guaranty of the illegal State government not having been under the protection of the Federal Constitution." **68**, 472. [1]*State ex rel. Bloomstein v. Sneed.* 1876.

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[1] See same case, art. 1, sec. 17, p. 127.

Bank of Tennessee — Torbett Issue—Tennessee—Acts Binding During Period of Rebellion, Except When Done in Aid of that Rebellion, Etc.— This case was decided, Special Judge JOSIAH PATTERSON delivering the opinion of the court, reported in 72, Tenn., p. 718. On appeal to the Supreme court of the United States, the opinion of the Supreme court of Tennessee was overruled and the case reversed. MILLER, C. J., held: "The State of Tennessee having organized in 1838, the Bank of Tennessee, agreed by a clause in the charter to receive all its issue of circulating notes in payment of taxes, but by a constitutional amendment adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. Held that this was forbidden by the constitutional provision against impairing the obligations of contracts, There is no evidence in this record that the notes offered in payment of taxes by plaintiff were issued in aid of the rebellion, or on any consideration forbidden by the Constitution or laws of the United States, and no presumption arises from anything of which this court can take judicial notice. The political society which in 1796 was organized and admitted as a State into the Union, by the name of Tennessee, has retained the same body politic to this time. Its attempt to separate itself from the Union did not destroy its identity as a State, nor free it from the binding force of the Federal Constitution. Being the same political organization during the rebellion, and since, that it was before, an organization essential to the existence of society, all its acts, legislative and otherwise, during the period of the rebellion, are valid and obligatory on the State now, except where they were done in aid of that rebellion, or are in conflict with the Constitution and laws of the United States, or were intended to impeach its authority." Justices WAITE, BRADLEY and HARLAN dissented. 97, U. S., 454. [1]*Keith v. Clark.* 1878.

Rights of Creditors Acquired Under One Act Can Not be Divested Under a Subsequent Act.— DEADERICK, J.: "In this case the receiver and back tax collector for Memphis, appointed under chapter 92, Acts of 1879, applied for instructions of the Chancery court at Memphis. In his petition or application for instructions, he represents that the Act of March 23, 1883, amending section 5 of chapter 92 of the Act of 1879, and the Act of March 27, 1883, which makes the indebtedness due policemen, firemen, and other employees for 1878, and January, 1879, receivable for the general taxes of 1875 and 1876, materially modify the character of indebtedness receivable for back taxes. . . . In the case of Memphis *v.* United States, 7 Otto, 293, it was held 'that the relator had acquired a vested right by his judgment, and his alternative writ of *mandamus* to have a tax levied sufficient to pay the debt due to him from the city; a right of which he could be deprived by no subse-

[1] See **76**, 703; **78**, 471.

quent act of the legislature. We do not deny,' the court adds, 'that it is competent for a legislature to repeal an act which, when it was passed, was a mere gratuity, if, while it was in existence, no vested rights have been acquired under it, or by virtue of it.' The right which the relator had was conferred by the act of the legislature of this State, passed in 1873. He obtained judgment, and pursuing his remedy under said act, issued the alternative writ of *mandamus*, and the day after its issuance the act of 1873 was repealed, and it was held that when the alternative *mandamus* was issued, a proceeding was commenced under and by virtue of the statute, and the repealing act was inoperative and void, so far as it undertook to take away the rights the relator had, 'in force of his judgment.'" In accordance with the above cited authority, the Acts of 1883 were declared inoperative and void. **79**, 493. *The State for use etc. v. Butler et al.* 1883.

Private Corporations—Powers in General.

Power to Charter Corporations an Incident of Sovereignty—Banking a Common Law Right, Until Restrained by Act of 1827—Exclusive Privileges—Discounting Notes at 7 Per Cent—Not Usury—Law of the Land—Art. 11, Sec. 2.—TOTTEN, J.: "By the charter of the Union Bank of Tennessee (1832, ch. 2, art. 11), it is provided that paper having over ninety days and under six months to run to maturity may be discounted at the rate of 7 per cent per annum. If this provision in the charter be valid under the Constitution, there is no usury in this case; if invalid, there is usury to the extent of one per cent, as charged in the bill; and this is the question which we are to consider. The counsel for the plaintiff, in stating their argument, say that by the general law (1819, ch. 32) in force now, and at the date of said charter, the legal rate of interest is six per cent per annum; to take a greater sum is a public offense, punishable in a legal proceeding. That under the Constitution no one's rights can be taken or affected 'but by the judgment of his peers or the law of the land;' by which is meant a general public law, equally binding, in like circumstances, on every member of the community. That the bank has taken a greater rate of interest than others can take under the general law; and that its charter, permitting it to do so, is a *partial law*, and therefore, repugnant to the Constitution. In considering this question it may be observed that the power to grant corporations is an incident of sovereignty, and belongs to every sovereign State. With us it is exercised by the legislature, and it may lawfully confer upon the corporators any rights and privileges it may deem proper and expedient, not inconsistent with the Constitution of the Union or the State. In the present case, the act of incorporation creating a bank confers upon it such rights and privileges as was deemed necessary and proper for the success of the institution. . . .

"It is not like an ordinary law prescribing a rule of action, which should be general in its nature, but is a law in the nature of a contract, granting a franchise to the corporators, and investing them with a legal estate therein. It must, of necessity, be limited and restricted in its operation to the persons to whom the franchise is intended to be granted, and denied to others. Yet, it can not be deemed a *partial law* in the sense of the Constitution, and repugnant to its provisions. We may observe that the business of banking was a common-law right, which any person, at his discretion, might lawfully exercise, until it was restrained by the Act of 1827, upon considerations of public policy and convenience. Ohio Ins. Co. *v.* Merchants' Ins. Co., 11 Humph., 23. That law operates as a general prohibition against the exercise of this right, except where it may be granted as a franchise to natural persons or incorporated companies. But it has never been considered that the laws containing these exclusive privileges of banking are repugnant to the Constitution as not being '*laws of the land*' of general application. A right to take a greater interest than is allowed by the general law is a part of the franchise granted to the company, and for its validity must depend upon the same principle as that upon which the corporation itself depends—that is, the inherent power of the State to make the grant. The right to take a greater interest is an exclusive grant, denied to others; and so the right to pursue the business of banking is in virtue of an exclusive grant, denied to others; and if the one be repugnant to the Constitution, on the ground that it is not a general law, or '*law of the land*,' so must be the other. But we have seen that a law creating a corporation and granting a franchise is more in the *nature of a contract* than a '*law of the land*,' in the sense of the Constitution. The one is public, general, and equal in its operation, and subject to be altered or repealed at the will of the legislature; while the other is special, exclusive, and unequal in its operation, and being in its nature a contract, is not subject to the will or action of the legislature. In a word, the one is a public law, the other a legislative grant. And we may observe that in England corporations are created and may exist by royal charter merely, as well as by legislative grants. 2 Kent, 276.

"There was nothing in our State Constitution at the date of defendant's charter (1832) which declared that interest shall be at a uniform rate. This provision is contained in the reformed Constitution of 1834, and being general and imperative in its terms it is apprehended that no law or grant of a franchise can have a legal existence which stands in opposition to it. But it can have no application in the present case, it being of a date subsequent to the grant of the charter; and, besides, it contains a provision that nothing in it shall impair the validity of existing contracts." **33**, 118. *Hazen v. Union Bank of Tennessee.* 1853.

Original Charter Granted to New Corporation and New Charter Granted to Old Corporation — Difference — Changes in Charter — Acceptance by Majority and by Whole Number of Corporators. — MILLIGAN, J.: "The contract, or charter after acceptance, is inviolable between the State and the corporation, as it is, also, between the corporation and stockholders. Neither the one nor the other can disregard its obligations, or alter its essential franchises, without the unanimous concurrence of the stockholders. A corporation already in being, and acting either under a former charter or prescriptive usage, which accepts a new charter before the expiration of the old, may still act under the former, or partly under the one and partly under the other. Rex *v.* Cambridge, 3 Burr., 1656, 1663; Ang. & Ames on Corp., 650. In this respect there is a vast difference between an original charter granted to a new corporation, and a new charter granted to an old corporation. In the former case the charter must be accepted *in toto*, or not at all; but in the latter, the corporation may act partly under both the new and the old charters. In The King *v.* Passmore, 3 T. R., 246, Lord Kenyon says that 'an existing corporation can not have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter.' The reason is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and, therefore, it can not be altered or added to without such consent.

"On the other hand, the State possesses over all corporations a sort of regulatory power by which the legislature may, if the corporation be a public corporation, under proper limitations, change, modify, enlarge or restrain its franchises, securing, however, at all times the property to the use of those for whom it was purchased. Ang. & Ames on Corporations, 650–1; Dartmouth College *v.* Woodward, 4 Wheat., 463; 2 Kent's Com., 352. But if it be a private corporation, whether civil or eleemosynary, which, in the great case of Dartmouth College *v.* Woodward, has been held to be an executed contract; and within the meaning of the tenth section of article first, of the Constitution of the United States, the legislature can not do more than pass such amendments to the charter as are merely ancillary to the main design of the corporation. It can not repeal, impair, or alter the rights and privileges conferred by the charter against the consent, and without the default, of the corporation judicially ascertained and declared. 2 Kent's Com., 352; Redfield on Railways, sec. 56, sub-sec. 7, and note; also Stephens *v.* Rutland & Burlington Railway, 1 Law Rep., 154. In such case, if the alterations proposed in the charter of a private corporation, by legislative enactment, are merely auxiliary and not fundamental, they may be accepted by a majority of the corporators; and when so assented to, they are binding on the whole; but it is otherwise, as we have already shown,

when the alterations are fundamental, radical and vital, the acceptance must then be unanimous." **43**, 498, *Woodfolk v. The Union Bank et al.* 1866.

Water Company — Exclusive Privilege a Contract.—"On the 28th of February, 1870, the legislature granted a charter of incorporation to the Memphis Water Company for the purpose of supplying water to the city of Memphis, and the inhabitants thereof, by means of public works. . . . After the water company entered upon the construction of its waterworks under its charter, the city of Memphis commenced to erect waterworks for the purpose of supplying the city and its inhabitants with water, and proceeded to erect the same on its own account, in violation of the provisions of the charter of the water company, which declares that the privileges granted it are exclusive for the period of thirty years, claiming that the city has the right to do so under the city charter, which the water company, on its part, denies, and insists that the action of the city is an invasion of its rights under its charter."

NICHOLSON, J.: "The Memphis Waterworks Company is a private corporation, and upon the acceptance of its charter by the corporators, and their organization under it, a contract was thereby consummated between the State and the corporators which was beyond the reach of subsequent legislative interference. It is conceded that by its express terms the privilege granted to the Memphis Water Company for thirty years is exclusive. What provision of the Constitution forbids the granting of a charter with an exclusive privilege? The legislature has the right to do whatever is not expressly, or by necessary implication, forbidden by the Constitution. 8 Hum., 1; Cooley's Const. Lim., 87, 158, 173." **52**, 526. [1]*City of Memphis v. Memphis Water Co.* 1871.

Statutory Regulation of Corporations Chartered by Special Acts.

Railway Charter — When it May be Altered or Repealed.—MCFARLAND, J.: "The charter of the petitioner was granted by the same legislature that enacted the Code of 1858, and there are some slight discrepancies between the mode of procedure pointed out by the charter for this proceeding, and the general provisions on that subject in the Code.[2] These discrepancies relate principally to matters of form, and are in no respect essential. We are to be governed, we think, by the general law. The provisions of the charter, in the parts referred to, are not in the nature of a contract that may be considered as impaired by the subsequent general provisions; and, besides, there is

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[1] See same case, art. 1, sec. 22; art. 2, sec. 17; art. 11, sec. 8.

[2] T. & S., 1325 et seq.; M. & V., 1549 et seq.

nothing to show that the charter had been accepted, or acted upon, before the general provisions were passed." **59**, 55. *Miss. R. R. Co. v. McDonald.* 1873.

Corporations Subject to General Regulations for Good Government and Rights of Individuals—General Banking Act of 1859-60—Transfer of Bank Stock.—DEADERICK, J.: "While it is true the State may not impair the obligation of a contract or take from the corporation any essential right, which is conferred by the charter, yet it has been held that this inhibition against impairing the obligation of contracts, does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve from the operation of such general regulations, for the good government of the State, and the protection of the rights of individuals, as may be deemed important. All contracts and all rights are subject to this power, under the police power of this State. Cool. Const. Lim., 574. . . . 27 Vt., 140, and Thomp. Liability of Stockholders, sec. 65, citing a number of cases.

"In this case the act of the legislature is a general law, applying expressly to all banks already chartered and those thereafter to be chartered. It does not assume to take away the power to assign stock, but simply to regulate its transfer; imposes no new obligations or restrictions, but prescribes the conditions upon which the original stockholders might assign their stocks, and if in the cases of railways and ferries the legislature might impose obligations not specifically required in the charters of the company involving the outlay of money, and to that extent an injury, we see no reason why the legislature may not, when the public good requires it, regulate the transfer of stock. In this case the new organization was had after the enactment of the banking law, and with knowledge of its provisions." **72**, 584. *Marr v. Bank of West Tennessee* 1880.

Exemptions From Taxation by Special Contract.

State Constitution Has No Power to Violate Obligation of Contracts—When Laws Imposing Taxes Other Than Those Named in Charter Are Invalid—Charter by Special Act a Contract.—The State granted the bank a charter, by a section of which it was stipulated "that in consideration of the privileges granted by the charter, the bank agrees to pay annually one-half of one per cent on the amount of the capital stock paid in by stockholders other than the State." By virtue of the supposed requisitions of the Act of 1836, chs. 13 and 14 of the public acts, a tax of five cents for the State and ten cents for the county on each one hundred dollars of capital stock paid in the bank was assessed in Davidson county. It was contended by the defendant that they were exempt by their charter from taxation; also, that the legislature, by

the charter granted, made a contract with the bank that no other tax should be assessed, in consideration of the annual payment of one-half of one per cent, and that any law imposing a tax upon the bank would be in violation of both the Constitution of the United States and that of Tennessee.

TURLEY, J.: "Under this constitutional provision and legislative enactment the tax thus assessed is now sought to be collected from the bank. The first question which is presented is whether, if the construction which the attorney general of the State contends for should be given to the clause in the amended Constitution and to these acts of the legislature be correct, their provisions are not, as far as the Union Bank and Planters' Bank are concerned, incompatible with that part of the Constitution of the United States which provides that 'no State shall pass any law impairing the obligation of contracts.' Art. 1, sec. 10, Const. U. S. Ever since the determination of the great case of the Trustees of Dartmouth College *v.* Woodward, 4 Wheat., 518, it has been considered as settled beyond controversy that a charter of incorporation is a contract, and that any statute altering it in a material respect, without the consent of the corporation, is a law impairing the obligation of the charter, and is unconstitutional and void.

"It has not been contended that a convention of the sovereign power of the State could, by an amendment of the Constitution, do that which, by the Constitution of the United States, the legislature is prohibited from doing; neither, in our opinion, could it have been successfully contended for, for a contract, once made, is obligatory upon the parties thereto, in morals and in law, until it has been performed according to its spirit and meaning. We repudiate the idea that a convention of a State has more power to violate contracts than the legislature. If it were otherwise, there would be no safety in times of excitement, under our form of government, for the most sacred rights. The question, then is, does a law imposing a tax on the capital stock of the Union Bank impair the obligation of the contract of incorporation made with the State?

"In the case of the Providence Bank *v.* Billings and Pitman, 4 Pet., 514, it is determined by the Supreme court of the United States that a State has the power to tax all moneyed corporations which have been chartered by her laws, and that a relinquishment of this power is never to be assumed unless the charter contain a stipulation exempting from taxation, or words which in themselves would justify the opinion that the power of taxation was in the view of the parties, and that an exemption was intended, though not expressed. This exemption, it is argued, is found in the eleventh section of the act incorporating the Union Bank, by which the bank agrees, in consideration of the privileges granted by the charter, to pay to the State annually one-half of

one per cent on the amount of capital stock paid in by the stockholders. This, it is said, is the tax to be paid by the bank to the State by express contract, and that, being thus taxed, no law imposing additional burdens on the institution can be considered as having any validity. The weight of this argument is felt, and is sought to be obviated by insisting that the one-half of one per cent is paid in consideration of the privileges granted by the charter, and is not to be considered as a relinquishment of the right on the part of the State to impose additional taxation on the property of the bank, of which the capital stock forms a portion. It is unquestionably true that the payment of one-half of one per cent on the capital stock is in consideration of the privileges granted by the charter, and does not exempt from taxation any property of the bank not necessarily included in and forming a portion of those privileges, and without which they could not possibly be enjoyed. What are the privileges granted? Among others, the right to use the capital stock of the institution for all legitimate banking purposes. This is the end and design of the act of incorporation, the privileges for which the one-half of one per cent was contracted to be paid, and out of which the fund for so doing was to be raised. How can the privilege of banking, which is given by the charter, be exercised without a use of the capital stock of the institution? Can bills or notes be bought or exchange made without money? Surely not. Then, when an institution contracts with the State for the right of doing these things, and pays therefor a valuable consideration, does it not necessarily follow that it has contracted and paid for the use of those means without which the right would be nugatory? . . . This construction of the contract is strengthened by the wording of the eleventh section of the charter. If it had been intended to pay only for a naked privilege, without the use of the means for enjoying it, it would seem that a definite sum, in gross, would have been specified. . . . Then, if the Union Bank, in consideration of the payment annually of one-half of one per cent on its capital stock, has purchased from the State the privilege of employing it in banking operations, does a law which imposes, in addition thereto, an annual tax on the same capital thus employed impair the obligation of the contract? Most unquestionably it does. The bank has agreed to pay one amount, and the State, without its consent, has superadded another. Then, if the construction sought to be given to the clause of the Constitution of the State, and the acts of the legislature which have been referred to, be correct, their provisions are in direct violation of the Constitution of the United States, and they are, so far as they may seek to tax the capital stock of the bank, null and void." **17**, 495. [1]*Union Bank v. The State.* 1836.

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[1] See same case, art. 2, sec. 28; also, **65**, 556.

Taxation — Exemption From, Under Bank Charter — How Far This Right Extends. — COOPER, J.: "It may be conceded, therefore, in accordance with the authorities cited and relied on by the learned counsel of the complainant, that a contract by charter for the payment of a particular tax, 'which shall be in lieu of all other taxes,' will protect the capital stock of the corporation, and all the property in which that capital stock may be lawfully invested for the purposes of the incorporation, from any additional taxation. But, as we have seen, an exemption from taxation, and for the same reason a limited exemption, will not exempt property beyond the legitimate wants of the corporation for the purposes of its incorporation. And, clearly, such exemption would not protect property which the corporation is without authority to hold. If it were otherwise, the corporation might abandon the purposes for which it was created, and invest its capital in property, and extend the immunity conceded for a specific object to the exemption of that property from the common burden of government. The authorities relied on cover cases in which property was legally bought and held for corporate purposes. No case has been produced, and, perhaps, none can be, where the property was not necessary for the purposes of incorporation, and not authorized to be held by the corporation." **74**, 706. [1]*Bank of Commerce v. McGowan.* 1881.

Certain Tax in Lieu of All Other Taxes — Exemption Clause in Charter — Rule of Construction. — CALDWELL, J., held: "Under charter granted prior[2] to Constitution of 1870 to a bank or insurance company, containing a provision 'that said company shall pay to the State an annual tax of one-half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes,' both the capital stock of the corporation and the shares of stock in the hands of the stockholders are exempt from all other taxes, whether *ad valorem* or privilege, imposed by State, county or municipality. This decision rests alone upon the authority of Farrington *v.* Tennessee, 95 U. S., 679, so far as it is held that both capital stock and shares of stock are exempt under said provision. Except for the controlling authority of said case, this court would determine otherwise. . . . Doctrine reaffirmed that a charter exemption from taxation, granted and accepted prior to Constitution of 1870, constitutes an inviolable contract binding upon the State, which can not be impaired by subsequent legislation. . . . Also that exemptions from taxation are never allowed by the courts except upon 'the clearest grant of organic or statute law,' or unless 'manifested by words too plain to be mistaken,' or declared in 'clear and unmistakable' language, or 'be

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[1] Affirmed by United States Supreme court January 9, 1892, FIELD, J., delivering the opinion, which is reported in **104**, U. S., 493–497.

[2] Acts 1857–58, ch. 166; Acts 1869–70, ch. 93.

shown indubitably to exist.' The existence of such exemption must be free from any reasonable doubt." **91**, 546. *Memphis v. Bank and Insurance Co's.* 1892.

Imposition of Taxes Other than Those Mentioned in Charter Can Not be Made.—SWAYNE, J., held: "A charter of a bank which declares 'that the bank shall pay to the State an annual tax of one-half of one per cent, on each share of the capital stock subscribed, which shall be in lieu of all other taxes,' is a contract between the State and the bank, and any other tax than that therein specified, is expressly forbidden. Revenue laws of the State imposing other taxes on the shares than those mentioned in the charter, impair the obligation of the contract, and are void under the United States Constitution." Judges STRONG, CLIFFORD and FIELD dissented. **95**, U. S., 679, 694. [1]*Farrington v. The State et al.* 1878.

Corporations—New Powers—Taxation—Special Provision as To—Charters Inviolable.—COOKE, Sp. J., held: "The State may authorize a corporation to alter its original enterprise and exercise new franchises to any extent without impairing any contract with the corporators. The effect of such a law is merely permissive, and takes away no existing power and affects no existing right.

"The provision in an act of incorporation that the company 'shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes,' is valid, and relieves the corporation of all other taxes, State or municipal. Under this provision its real estate necessary for the transaction of its business, is not subject to taxation.

"Neither the legislature nor a constitutional convention has the power to violate the contract between the State and a corporation contained in the charter of the latter." Judge FREEMAN dissented. **81**, 400. *The State v. Butler et al*, 1884.

What Property of Bank Not Exempt From Taxation.—FREEMAN, J., held: "Where a clause in the charter of a bank exempts from taxation a building which the company are allowed to erect under the charter for the purpose of carrying on the business of the bank, if any part of such building be not so occupied, but is leased out, the exemption will reach and cover only so much of the building as is necessary for the use of the bank." **65**, 416. *DeSoto Bank v. City of Memphis.* 1873.

Privilege—Contract Against Taxation Can Not be Implied—Federal and State Constitutions.—MILLER, J., held: "A contract against taxation of a company can not be implied, because permitting the State to tax the company by a license tax for the privilege granted by its charter

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[1] Reversing the judgment of the Tennessee Supreme court. See **67**, 541, and sustaining Judges MCFARLAND and TURNEY, who dissented in the State court.

would destroy that privilege. To have an exemption from taxation, it is necessary to have a provision to that effect in the charter, in clear and unmistakable language. The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the States. That is left to the State Constitutions and State laws." **109**, U. S., 398–401. *Memphis v. Gaslight Co. and Taxing District of Shelby County.* 1883.

Taxation — Exemptions Valid Under Constitution of 1834 — GEORGE GILLHAM, Sp. J., reaffirmed the doctrine that, "under the Constitution of 1834, the legislature had power to grant an exemption from taxation that constituted a contract binding on the State, the obligation of which could not be impaired by subsequent legislative enactment or constitutional provision." **95**, 226. [1]*The State v. Bank of Commerce.* 1895.

Exemptions for Ninety-nine Years Into Whose Hands Soever Real Estate May Pass. — On a petition to re-hear, T. M. JONES,[2] Sp. J., said: "We do not deem it necessary to review the argument or cite any additional authorities in support of the conclusion which we reached. Our opinion was based upon a solemn judicial construction of the contract of North Carolina, as to the grant of the two hundred and forty acres of land, in which the lots were sought to be taxed are located. That decision, in clear and unmistakable language, held that these lots were exempt from all taxation for ninety-nine years, from the passage of the Act of 1875, 'into whose hands soever they might pass.' That this decision had been acquiesced in by the State, county and city, for nearly half of a century. That the citizens relying upon, and having a right to rely upon, this decision made by the Supreme court of their own State, was a correct construction of the contract, had invested their capital in the purchase and improvement of the lots, embraced within the two hundred and forty acre grant — they believed, and had a right to believe, that this construction of the statute of contract holding these lots to be exempt from taxation for ninety-nine years, formed a part of the statute or contract, and their right having vested under it, no future legislature, or even a constitutional convention, could impair those rights. Now to hold these lots, in the face of the decision of 1836, and the acquiescence of the State and city, ever since, not only for taxes for the present year, but for back taxes for over ninety years, if the legislature of the State choose to enforce this collection, and which would be a complete confiscation of all of their lots, we hold would not only be unjust and a great wrong, but a violation of law and well set principles of law. The exemption only extends for ninety-nine years from

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[1] See same case, art. 2, sec. 28; art. 11, sec. 8.

[2] Judges COOPER and TURNEY being incompetent, Messrs. John V. Wright and T. M. Jones sat in their stead. See same case, art. 2, sec. 17; also, The State *v.* Hicks et al. **17**, 487.

the passage of the statute of 1785, and only to those lots embraced within this two hundred and forty acre grant. This was the decision in 1836, and this is our decision now."[1] Judges McFarland and Freeman dissented. **76**, 594. *The State ex rel. Gaines Comptroller v. Whitworth, Trustee.* 1881.

Exemptions — Municipal Corporations.

Act Extending Corporate Limits—Exempting Lands from Taxation.— This was an injunction bill to restrain the corporation from proceeding to collect a railroad tax assessed upon the complainant's lands, which were taken into the corporate limits by an act passed February 17, 1854, containing a proviso to the effect that the "lands thus taken in" shall not be subject to a corporation tax while held as woodland, or for farming purposes, etc. By a subsequent act, passed the 20th of November, 1857, the foregoing proviso was repealed, "so far as to render all lands within the present limits of said corporation liable to railroad tax, should the same be voted and imposed by said corporation." The charter authorized a subscription to railroads. Complainant's lands were still woodland. It was contended that the act of 1854 having been accepted by the corporation as an amendment of its charter was a contract between the corporation and the owners of the land which was impaired by the act of 1857. McKinney, J.: "The case under consideration is destitute of every element of a contract. The extension of the corporate limits of Chattanooga was an exercise of governmental power of which the persons newly taken in could not be heard to complain; they had no voice in the matter, no power to resist, nor was any legal right of theirs infringed thereby. The provision of the act exempting their lands for a time from a corporation tax was without any consideration moving from them, and purely gratuitous on the part of the legislature; and, to say the least of it, was an invidious and improvident provision made in their favor.

"It is unquestionably true that the government may surrender the power of taxation, in respect to particular lands, in favor of an individual, and it is no less true that the provision of the Constitution securing the inviolability of contracts extends as much to contracts with a State as to contracts between individuals. But the surrender of this, or any of the rightful powers of government, is not to be presumed; nor is the bestowal of a privilege, for a limited time, and without consideration, to be taken as obligatory on the legislature in a case like the present. The exemption contained in the Act of 1854 was a privilege which the legislature, in its discretion, might bestow, and which it might at pleasure take away, inasmuch as no private vested right was affected in the sense of the Constitution. The grant of the privilege, and its

[1] Affirmed by U. S. Supreme court March 1, 1886, Waite, C. J., delivering the opinion, which is reported in **117**, U. S., 129–139.

resumption, were alike discretionary matters of sovereignty." 40, 321. [1]*McCallie v. Mayor etc. of Chattanooga.* 1859.

Municipal Corporation Has No Right to Levy Tax where State is Estopped.—Question: Did the city of Memphis have the right to exact payment of a license tax of corporations for exercising their respective franchises within its corporate limits, when the State had exempted said corporations by the terms of their charters from a greater tax than one and one-half per centum?

NICHOLSON, J.: "Whether wisely or unwisely, it is clear that the legislature by this language has estopped itself from imposing any other tax for State purposes, and has agreed that the companies shall be exempt from 'all other taxes.' This must necessarily operate as a prohibition against the imposition of taxes either by the State, county or city government. It was an open question in our State, it might very well be questioned whether one legislature has the right by an act of incorporation, for a consideration received or supposed to be received, to exempt certain property, rights, or franchises from taxation by a subsequent legislature. But, as remarked by Mr. Cooley, on page 280 of his work on Constitutional Limitations, 'it has been so often decided by the Supreme court of the United States, though not without remonstrance on the part of State courts, that it is a contract protected by the Constitution, that the question can no longer be considered an open one.' It involves the construction of the clause of the United States Constitution forbidding the States to 'pass laws impairing the obligation of contracts,' and on that account the decisions of the Supreme court of the United States must be regarded as conclusive on the question. . . . 'It is clear that municipal corporations are not authorized to levy taxation on property or privileges other than such as are taxable by the statutory laws of the State. Nashville *v.* Thomas, 5 Cold., 600. The municipal corporation is an agency of the State government, and can exercise no powers in contravention of the general law, and none but those expressly granted or necessarily implied. It follows that if the State has estopped itself from imposing other taxes on the exercise of the franchises granted, the municipal corporation is equally estopped." 65, 527. *City of Memphis v. Hernando Insurance Co.* 1873.

Municipal Corporation—Suit Against Old May Be Renewed Against New.—COOPER, J., held: "When the charter of a municipal corporation is repealed, and the same people and the same territory are reincorporated as a municipality under a new name, although with different powers and different officers, a suit pending against the old corporation at the date of the repeal may be revived against the new corporation." MCFARLAND, J., dissented. 74, 730. *O'Connor v. City of Memphis.* 1881.

[1] See same case, art. 2, sec. 29.

Municipal Corporations May Forbid Erection of Buildings — Contract Not Impaired, When.—FREEMAN, J., held: "It is not the impairment of the obligation of a contract, in the constitutional sense, for a city to pass an ordinance forbidding the erection of wooden buildings within fire districts, although the contract was made to do so, before the passage of such ordinance. . . . The argument is earnestly pressed upon us, that the ordinance is void as impairing the obligation of the contract with the owner to build, or with the workmen who had contracted to erect the building. We take it, there is nothing in this objection. The principle applicable to this aspect of the case is thus stated by Mr. Parsons: 'If one agrees to do a thing that is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise, and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do it, this act also avoids the promise.' Parsons on Cont., vol. 2, p. 674." **80**, 121. *Knoxville v. Bird.* 1883.

Public Road Through Town — Legislative Power Doubted.—It appeared to the court that the town of Knoxville was recognized as such by several acts of assembly. The court of Knox county made an order, appointing viewers of a road within the limits of the town. The viewers made return that it should pass through Cowan's lot. The sum of one hundred dollars was assessed as damages to Cowan. After deciding that the [1]Act of 1804, ch. 1, sec. 1, authorizing the County court to order the laying off and discontinuing of such roads within a county as they shall deem proper, could not by a literal construction be extended to streets, the court said that the erection of territory "by the legislative authority into a town creates a state of private property and interest distinct from the body of the county, and it is essential to its very existence that its local establishment should be regulated by the townspeople," and said further, that "it is scarcely probable that the legislature meant to give a power which it were doubtful, to say the least of it, whether they possessed themselves. The legislature had an undoubted right to lay off a town or not to do it. But when it was done it may be said to be on the principles of implied contract that those small lots sold under the sanction of government should forever be held as private property, and not subject to be violated in turning them into the ordinary purposes of county roads; but on this last point it is not necessary to give any decisive opinion." **1**, 311. *Nathaniel Cowan's Case.* 1808.

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[1] H. & C., vol. 1, p. 284; Code 1858, 1183; T. & S., 1183; M. & V., 1323.

Charter Rights of Turnpike and Bridge Companies.

Public Bridge — Subsequent Act Converting It Into a Toll Bridge Valid, When.—The Act of 1819, ch. 103, authorized the building of a bridge across Duck river adjoining the town of Columbia. By an amendatory Act of 1823, ch. 139, the County court of Maury was authorized to convert this into a toll bridge, which was done. GREEN, J., held: "This latter act creates no right in the County court of Maury, in relation to the bridge that might not be abridged or taken away altogether by a subsequent act; and the erection of a bridge contiguous to the old one by the Franklin and Columbia Turnpike Company under their charter — Private Acts 1835, ch. 14 — will not interfere with any right of the County court of Maury." 21, 468. [1]*Franklin and Columbia Turnpike Co. v. Campbell.* 1841.

Shunpike Road Opened By County Court — Injunction.—TURLEY, J., held: "The power to open roads is a prerogative of sovereignty, which has been delegated by the legislature to the County courts, and is exercised by them as a municipal, and not a judicial, function, and as the legislature could not, after the grant of a charter to build a turnpike road and receive toll thereon, grant another charter, the only object of which was to evade the payment of the toll on the previous road, so the County court can not lawfully establish a road to the same end, and equity has jurisdiction to remove the obstruction to the franchises of the turnpike company as a nuisance upon its rights." 27, 343. *Franklin and Columbia Turnpike Co. v. Maury County.* 1847.

Toll Bridges—Exclusive Privilege for Certain Distance—Act Authorizing Construction of Another.—In 1829 the legislature granted to the plaintiff the right to erect a bridge across Red river, at the town of Clarksville, with the usual power to exact tolls of persons crossing the bridge, and stipulated in the charter that no other toll bridge should be at any time erected within one-half mile of the plaintiff's bridge. The plaintiff erected its bridge at the place designated in the charter, and continued to exact tolls of persons crossing it until the commencement of this suit. In 1847 the legislature authorized the municipal authorities of the town of Clarksville to purchase the plaintiff's bridge, or to erect a free bridge near to the same. The corporation commenced building its bridge within a few feet of the plaintiff's bridge, whereupon it filed this bill in chancery at Clarksville, praying an injunction against the erection of said free bridge, and asking compensation for the damage sustained thereby. The chancellor (Judge Brien) dismissed the bill, and complainant appealed.

MCKINNEY, J.: "In view of all the facts of this particular case, we think the complainant is entitled to compensation as prayed in the bill.

[1] Meigs' Digest, vol. 2, p. 885.

Whether or not the charter granted to the complainant contains the exclusive right alleged in the bill, and admitted in the answer, does not certainly appear, nor is it important to inquire how the fact is, with a view to the decision of the present case. For, assuming that it does, still we think it clear that such exclusive right must yield to the public interest. And admitting the grant to be a contract, and that is inviolable, yet to hold that the property or franchise acquired under it may be taken for public use, 'upon just compensation being made therefor,' is not to violate or impair the contract, in the sense of the Constitution. The proof in this record establishes that the bridge of the complainant was amply sufficient for the accommodation of the public, and that the sole and avowed object of the erection of a free bridge, within a few feet of the former, was to divert the whole travel from it, and thereby destroy its value, under a belief that the inducement held out to the public by a free bridge would greatly promote the local interests of the town of Clarksville.

"It is manifest that the erection of a free bridge, under the circumstances of this case, amounts to a total destruction of the franchise granted to the complainant, in principle and in effect. The site and structure of the old bridge might as well have been taken and appropriated to the use of the new one; and while we concede that this might be done, and likewise concede that the grant to the defendants must be regarded as sufficient evidence that the public interest required that it should be done, yet we hold that it could only be done upon the condition of making 'just compensation' to the complainant for the franchise thus destroyed. **33**, 176. *Red River Bridge Co. v. Mayor etc. of Clarksville.* 1853.

Statute Setting Back Toll Gates Impairs Contract and is Void — When — Recognition of Charter — Law of the Land — Distinctive Departments of Government — Police Power. — COOPER, Ch.: "The legislature, on March 16, 1877, passed an act entitled 'An Act to set back toll gates on White's Creek pike.' This act, after reciting, by way of preamble, several of the facts touching the White's Creek Turnpike Company hereinbefore noticed, undertakes, as it says, 'by virtue of the police power of the State,' to require the company to move back its first gate at least two miles from the corporate limits of Edgefield, and the second gate at least five miles from the first, under the penalty, on failure, of forfeiting all right to demand or receive toll on said road. The act does not purport to be an amendment to the charter of the company, nor has it been treated as such in the argument, nor has it been claimed that the company has accepted it as an amendment. The argument on behalf of the defendants is that the act is a law within the police power of the State, which the legislature could constitutionally pass, and which the company were bound to obey or lose all right to

take toll. In this view, the company would have no interest in the question of the new road. The rights of the parties, therefore, turn upon the validity of the act in question."

After quoting from several authorities the elementary principles of law in regard to charters being contracts, Judge Cooper says: "The counsel of the defendant do not deny these elementary principles, but insist that there is an exception in the exercise of the police power of the State. And, undoubtedly, a corporation, like an individual citizen, takes its rights and franchise subject to the regulating control of the legislature. 'The limit,' says Mr. Cooley, 'to the exercise of police powers in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments to the charter in curtailment of the corporate franchise.' Cooley's Const. Lim., 577. Accordingly, where a corporation was chartered with the right to take toll from passengers over their road, a subsequent statute authorizing a certain class of people to go toll free was held void. The State *v.* Martin, 1 Tenn. Leg. Rep., 374; Pingrey *v.* Washburn, 1 Aik., 268. And where a turnpike was authorized by its charter to locate its gate at a particular place, which was done, a subsequent act requiring them to remove the gate was held to be unconstitutional and void, though in the meantime a village had grown up and around the gate. Attorney General *v.* Germantown and Philadelphia Turnpike Co., 55 Penn., 466. *A fortiori*, if, as in the case before us, the village is not less than half a mile from the gate.

"It is argued that the exercise of a right, lawful in its inception, may become a nuisance, and liable to abatement as such. If the position be conceded, there is nothing disclosed by the record to bring this case within its operation. The talk of tolls under a legislative grant, however unpalatable their payment may be to a citizen, is not a nuisance in law. The decisions, as we have seen, are directly the reverse—that it is a nuisance to resort to a device to avoid their payment, and that the exercise of an undoubted power by a court, if it tend to this result, will be enjoined by this court upon that very ground. Besides, the abatement of a nuisance is clearly not a legislative but a judicial act. It can only be done by legal proceedings according to the law of the land, in which the supposed offender will have an opportunity to be heard, not by a legislative fiat. All the legislature can do under our constitution is to declare, by a general law, what is a nuisance. The application of the law in the determination of private rights belongs exclusively to the courts.

"By the Constitution of 1870, art. 11, sec. 1, the powers of the government are divided into three distinct departments. . . . By art. 6, sec. 1, the judicial power of the State is vested in the courts. By art. 1, sec. 8, of our Bill of Rights, no person can be deprived of his privileges or property 'but by the judgment of his peers or the law of the land.' All these provisions have been contained in each of the three constitutions adopted since the organization of the State government, and repeatedly passed upon by the courts.

"The act before us undertakes to deprive the White's Creek Turnpike Company of the valuable franchise, acquired under previous legislative grant, of taking toll at its first gate. It does so, not by a general law directed to all turnpikes in like situation, but by a special provision pointed at this company alone, and upon a legislative adjudication that it has become amenable to the police power of the State. It is in plain violation of those fundamental principles of the Constitution which confine the judicial power of the State to the courts. It is not even in form of law, but a special act or edict for a particular purpose, and that purpose the destruction of a private right, without a hearing." Tenn. Chancery Rep., vol. 3, p. 404. *White's Creek Turnpike Co. v. Davidson County et al.* 1877.

Turnpike Charter — Tollgates — Police Power. — FREEMAN, J., held: "The [1] Act of 1849–50 is not binding on turnpike companies, the charters of which had been passed, accepted, and the company organized under it before the passage of such act, when the charter prescribes the rights to take toll of all persons without limitations, etc., the charter being a contract, and as such can not be impaired. The police power of a State can not afford relief in such case." Tenn. Leg. Rep., vol. 1, p. 374. *The State v. Martin.* 1877.

Turnpike Company—Provisions in Charter—Indictment for Not Keeping Road in Repair. — DEADERICK, J., held: "A turnpike company is not protected from indictment for failing to keep its road in repair by a provision in its charter that if the company fail to keep its road in repair for the space of twenty days, upon information given, a justice of the peace shall summon three freeholders, and if, in the presence of said justice, said freeholders find said road out of repair, the tolls shall cease until the road is repaired, and the person entrusted with the repair of the road shall be subject to a fine of ten dollars, one half to go to the prosecutor and the other half to the [2] county." 84, 24. *White's Creek Turnpike Co. v. The State.* 1885.

Turnpike Companies — Charter Rights — New Roads and Bridges — Impairment of Franchise — Not Taking Property. — LEA, J., held: "The obligation of the charter contract, whereby a turnpike company is author-

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[1] Acts 1849–50, ch. 72, sec. 18; T. &. S., 1434, 1436, 1437. [2] M. & V., 1475 et seq.

ized to exact tolls from persons passing over its road and through its gates, is not impaired or violated, within the prohibition of the Constitution, by the action of the County court creating new public roads and bridges, the necessary effect of which is to divert travel from the turnpike and seriously reduce the company's revenues, provided the new roads and bridges are not, in intent and effect, mere shunpikes, but reasonably essential to the public convenience; and provided further, they are not located within territorial limits exclusively devoted to the turnpike company by a reasonable and valid provision of its charter. . . . And the impairment of a turnpike company's franchises and revenues by such lawful creation of public roads and bridges does not constitute such taking of its property for public uses as will render the county liable for damages thus inflicted." 91, 291. *Turnpike Co. v. Davidson County.* 1892.

The State Debt Case.

Right of the State to Preserve Its Own Existence — Power of the Legislature to Make a Contract Which Surrenders Power of Repeal and the Power to Legislate for the Public Good — Act Authorizing Settlement of the State Debt — Bonds — Coupon Feature — Jurisdiction of U. S. Supreme Court — Sovereign Power of the State to Deal With Public Debt, Raise Revenue by Taxation, Appropriate It, etc., by Successive Acts From Time to Time — Surrender of That Power — Integrity of the People. —The object of the bill in this case was to prevent the execution of an act passed by the legislature on April 5, 1881, authorizing the funding (by the issuance of new bonds) of much the larger part of the bonded indebtedness of the State. McFarland, J.: "The bonds authorized by the act will aggregate about twenty-seven millions of dollars. They are to run ninety-nine years from the 1st of July, 1881, redeemable at the pleasure of the State at any time after five years. They are to bear interest at the rate of three per cent per annum, evidenced by coupons payable semi-annually in New York. The third section provides that the coupons, on and after their maturity, shall be receivable in payment of all taxes and debts due the State, except for taxes for the support of common schools and for the payment of the interest on the common school fund, and said coupons shall show upon their face that they are so receivable. . . . The provision in regard to the coupon is not only a law regulating the collection and disbursement of the revenue and the conduct of the State's officers, but, under the construction put upon similar provisions by the Supreme court of the United States, it becomes part of the contract. The question, therefore, is, can one legislature, in the form of a law, make a contract which surrenders the power of future legislatures to enact laws for the public good? Can one legislature surrender those attributes of sovereignty which are

absolutely necessary, not only to the well-being of the State, but to its very existence? Stated in this form, there can be but one answer. No such power can or ought to exist. The power, from time to time, to enact such laws for the public good as may then appear necessary, is an essential element of sovereignty absolutely necessary for the existence and well-being of the State, and can not be surrendered. But, it is said, if this proposition be carried to its full length, it denies to the State the power to issue bonds in any form; that the power to bind the State by the 'coupon feature' of the law, is no higher than the power to issue an ordinary bond; that in each case the faith, honor, and credit of the State and its future revenues are pledged for the payment of the principle and interest of the debt, and nothing beyond this in either case. If the power exists to make one form of bond, it must exist to make the other, as the power to provide the manner of payment must be co-extensive with the power to create the debt. If the obligation contained in the 'coupon feature' be allowed to stand upon the same basis as the bond without this feature—that is, upon the faith and honor of the State—and bear the same construction, then this assumption might be correct. . . .

"The difference between the two characters of bonds is this: The ordinary bond pledges the honor and faith of the State. Each successive legislature, as the representatives of the people, is left to meet its part of the obligation. In doing so, they act from the sense of honor and good faith which is supposed to actuate the people of a sovereign State and their representatives. It is for them to determine what honor and good faith require, but there can be no power to coerce their action. They are not bound by previous legislation further than honor and good faith require they should be bound, and of this they are to judge. By the issuance of the ordinary bond, the power to legislate in the future for the public good is in no sense relinquished. On the other hand, the bonds with the 'coupon feature' not only pledge the honor and faith of the State, but practically takes the matter entirely out of the control of the people or any future legislature while the obligation lasts, not only as to the question whether the coupons shall be paid, but also as to the manner of their payment. The revenues to be raised by future legislatures are, to this extent, not only pledged, but actually appropriated and put beyond their control. To this extent they are deprived of all power of legislating upon the subject. So it is apparent that the powers exercised in the two cases are essentially different. . . .

"The right of the State to preserve its own existence and good government, and the right of the people to support and maintain themselves, is superior to the right of the creditor. This principle is recognized even in regard to private contracts by our liberal exemption laws. In the event of war, famine or pestilence, is it possible that a legislature

would not have the power to suspend the payment of these coupons, or postpone them, to the superior demand for the preservation of the State and the people themselves? In such an event, I do not think it can be denied that the power to repeal the law would exist. We can not know that such emergencies may not arise within the next ninety-nine years. It will not do to say that the legislature that passed this act determined that no such emergency would ever arise, and that it would never be necessary to repeal it. This is absurd. It is said that such emergencies are improbable, extreme cases that may never occur, and that we need not now undertake to provide against them. True, we need not; but we must preserve in the government the power to provide for such emergencies if they should occur—the power to protect itself and its people in times of calamity and peril. Extreme cases may always be supposed in order to test principles. This is not arguing that the act in question may become unconstitutional upon such future contingency. The happening of such future contingency is referred to for the purpose of showing that the act was in excess of legislative power at the time it was passed. Then if it be conceded that, under any emergency that may reasonably be supposed, the power to repeal the law would exist, it seems to me to follow inevitably that the act, which, according to the construction placed upon such acts, stipulates that it shall not be repealed, was beyond legislative power. It will not do to say that the legislature might make such a contract, but that we will annex to it the implied qualification, that upon sufficient emergency the law may be repealed and the contract impaired. This qualification necessarily destroys the whole contract. If the law may be repealed in any emergency, then who is to judge of the sufficiency of the emergency? Certainly not the courts. It can not be said that the courts would uphold a repeal of the act if, in their opinion, it was upon an emergency justifying it, and disregard the appeal if the emergency was not deemed sufficient. The considerations upon which the sufficiency of the emergency would have to be determined are not judicial in their character, but purely political and legislative. If, then, we concede that the sufficiency of the emergency is to be determined by the legislature, it inevitably results that they may repeal the law at pleasure, and the contract is without validity. . . .

"Whether our legislature has the power to bind the State by the contract supposed to be impaired, is not a question for the Federal Supreme court. This is a question depending upon the construction of our own Constitution, and belongs to this court. If our Constitution denies to the legislature the power to make the contract, and this court so declare, I do not understand that the Federal Supreme court has any jurisdiction to review our decision. It is certain it would not if the law be declared unconstitutional, and the proposed contract without

authority, in advance, and its execution prevented, whatever it might decide in the event the question were to come up after the bonds are issued. So that, when it is found that legislative acts of the character of this one are construed to be contracts, by which the State is subjected to the jurisdiction of the Federal court, and by which its sovereign power, necessary for its own existence and well-being, is surrendered, the State court is well justified in declaring that no power exists in the legislature to make such a contract. The State must reserve to itself and to each succeeding legislature the sovereign power to protect itself and to attend to its own local affairs. Its legislature can surrender no power not already vested in the Federal Government. Again, assuming that the debt will always be regarded as a just debt, and that no calamity will ever occur rendering the people for the time unable to meet the interest; that each successive legislature will be willing in good faith to discharge the duty of levying the necessary taxes; still it might, in their opinion, be necessary for the public good to change the manner of payment and repeal the coupon section, collect the taxes in money, and pay the coupons at the treasury. This might become necessary to prevent the various tax collectors in the State, many of whom are unskilled in business, from receiving counterfeit coupons. The delay in the collection of taxes, even when an ample amount is levied, may, on account of the prior claim of the coupon holders, be found to operate unjustly to the other creditors of the State, and create embarrassments for want of funds to meet the current expenses. The legislature might desire to obviate this by levying a separate tax, payable in money, to meet the current expenses, leaving an ample amount payable as before in coupons, to take up all that remain outstanding. Neither of these changes supposes any purpose to repudiate the debt. They would be perfectly fair and just, and not inconsistent with perfect good faith. Yet, if the contract be valid, neither of these changes could be made. Such changes in the law might be necessary for the public good, and yet the legislature of a sovereign State be without the power to pass them. We can not determine, nor was it in the power of the last general assembly to determine, that these changes would never be necessary or important. It is a power constituting an essential element of sovereignty necessary for the purposes of government, and can not be surrendered, but must remain with the people and their representatives for the time being. The extent of the power is not important. If one essential element of sovereignty may be surrendered, why may not all? Where is the limit? . . .

"It is said, however, that the bill attacks the act upon the ground that the legislature can not pass an irrepealable law, and hence this law is repealable; and at the same time assumes that the act is unconstitutional because it is not repealable. This argument is earnestly pressed,

and it is insisted that the law is either repealable or it is not repealable; if it is repealable no relief is now needed, and it will be for the legislature to repeal it at pleasure; if it is not repealable, the complainants are entitled to no relief by their own showing. This, though ingenious, savors of 'special pleading.' If the section in question was only a law, it would of course be repealable, but it involves also elements of a contract, and if the power exists to bind the State to these stipulations, and the terms be accepted, then the contract could not be impaired. As to neither of these propositions can there be any doubt. Nor can there be any doubt, under the decision of the Federal Supreme court, that this is a contract. No difficulty can exist as to its construction and meaning. It was intended to prevent the repeal of the law. The question is not whether it is or is not a contract, or as to the meaning of the contract; but the question is, whether the legislature had the power to bind the State to these stipulations. It is not an accurate statement of the position of the complainants to say that the act is unconstitutional because it is not repealable, but it is, because it professes to authorize a contract on behalf of the State which the legislature had not the power to make—that is, a contract relinquishing part of the sovereign power of the State. Of course, if the law be unconstitutional, it may be so declared, even after the bonds are issued; but it does not follow that it may not be so declared in advance. It is assuming that the question can not arise until there is an attempt to repeal the law—that until then there is no real case. But this overlooks the fact that this is not only a law, but professes to be a contract. If the court has jurisdiction and the proper parties are before it, no doubt can exist as to the right to declare in advance the want of power to make the contract, and prevent its consummation. . . .

"It simply resolves itself at last into the question, whether the sovereign power of the people of this State to deal with their public debt, to raise revenue by taxation and appropriate it, and enact laws in regard to the manner of such collections, shall remain with them and their representatives as they shall from time to time assemble, or shall that power be held to have been surrendered by the contract of one general assembly for ninety-nine years, and the jurisdiction thereby vested in the Federal court to coerce the State into the performance of the contract. It must be remembered that if the contract be valid, the people of the State can not change it even by constitutional amendment—they can not even in this mode impair the obligation. The last general assembly, actuated no doubt by a patriotic desire to redeem the honor of the State and do justice to its creditors, undertook to satisfy their demands by putting the obligation in such form that no future legislature could question the settlement or change the manner of payment. This feature of the law seems to have had its origin in a want

of confidence in the integrity of the people and their future representatives. In this I think the legislature exceeded its power. The responsibility of making provision for the debt, the honor and the good name of the State, must be left with the people. If they in an evil hour should choose to violate their faith, and bring reproach and dishonor upon themselves by repudiating debts that in justice they ought to pay, it will indeed be a sad calamity; but I am not to presume that such an event can ever occur. The people of this State can not be guilty of so great a folly and so great a crime; but if they choose to do so, I do not know how they shall be prevented. One legislature has no power to act upon such a presumption, and bind the people by a contract which surrenders their sovereign powers." **76**, 235. [1]*Lynn et al. v. Polk et al.* 1881.

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[1] See same case, art. 1, sec. 17, p. 128, and art. 2, sec. 2.

[1] This is known as the "State Debt" case. The judges were FREEMAN, MCFARLAND, TURNEY, DEADERICK, and E. H. EWING, Sp. J. Each judge delivered an elaborate opinion, all of the opinions covering more than 200 pages. I give extracts from the opinion of Judge MCFARLAND. Judges DEADERICK and EWING thought the act constitutional.

EMINENT DOMAIN.

Right to Services and Property — Compensation.

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ART. 1, SEC. 21. That no man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.[1] [Same as Const. 1834, art. 1, sec. 21; Const. 1796, art 11, sec. 21.]

Demanding Particular Services — Compensation.

Jurors — Compensation for Services Not a Common Law Right.—The Act of February 24, 1875, entitled "An Act to tax the losing party with the jury fees in all cases in civil suits, and to repeal sections 4036 and 4037 of the Code," was considered. It was insisted that the act was in violation of this section of the Constitution. NICHOLSON, J.: "The ground of this objection is, that in all civil cases in which the losing

[1] For indirect or unimportant references to this section, see **10**, 143; **36**, 530; **48**, 63, 72; **79**, 733; **82**, 65; **88**, 752; **90**, 602.

party is insolvent, the jurors will have been required to give their particular services to the public use without being compensated therefor. It is true, that in cases in which the losing party is insolvent, jurors will get no compensation, but in this respect they are placed on the same footing with others whose compensation is taxed as part of the costs of the case. Witnesses and officers of court are required to give their services, and to look to the costs when collected from the losing party for compensation for their services. It can not be assumed that compensation for services as a juror is a common law right. It is stated in the Mirror of Justice, ch. 11, sec. 4, that in the time of Henry I it was ordained that 'jurors sworn upon assizes should not have fees.' But it is one of the implied and necessary conditions upon which men form governments, that sacrifices must sometimes be made by individuals for the common good, for which no compensation can be claimed. Such sacrifices of time or personal service, or of property, are compensated for in the protection which the government furnishes for their rights of person and of property. Hence, whenever, in the judgment of the legislature, it becomes necessary to require the services of jurors in carrying on the courts, their services may be required, and, if need be, even without compensation; but this must be required in pursuance of laws enacted for that purpose by the legislature. But in the present case the legislature has not thought proper to require the services of jurors without compensation; they have only required parties litigant, in whose immediate service the jurors may be engaged, to make compensation by way of costs. If it should happen that no compensation is received in cases where the losing party is unable to pay, it is no greater sacrifice than many others are required to make for the common good." 63, 174. [1]*Neely v. The State.* 1874.

Right to Take Property for Public Use — Compensation.

Right of Eminent Domain Can be Exercised by the State for the Public Good Only — Not for the Benefit of any Individual — Land May be Condemned for the Building of a Grist Mill for Public Use — Miller a Public Servant. — GREEN, J.: "The affairs of a State can not be administered in the most beneficial manner if it has not the right, upon particular occasions, of appropriating to its own use portions of the property subject to its dominion. The necessary existence of this right creates a fair presumption that the State, in granting the land to individual citizens, does it with this reserve implied. This right of disposition is the eminent domain. Vattel, lib. 1, ch. 20, sec. 244. But although this right does exist, and the government may take private property, allowing just compensation, Blackstone says it is an exertion of power which is indulged with great caution. It is only for public uses the

[1] See same case, art. 1, sec. 6, p 17.

State is authorized to exercise it; and because the interests of the community require that, for the good of the whole, the private right must be yielded. It is a power never exercised for the benefit of an individual. Therefore the courts have uniformly held that the State has no right to take one man's property and give it to another. 2 Dallas, 310.

"Upon these principles the Act of Assembly of 1777, ch. 23, proceeds. The first section of that act declares that 'every water grist mill which shall hereafter be built, that shall at any time grind for toll, shall be held and deemed, and is hereby declared to be, a public mill.' The 10th section provides that the miller shall grind according to turn; that he shall grind the grain well, if water will permit; that he shall take no more than an eighth of the grain for grinding; and prescribes penalties if he violate any of these provisions. The 11th section prescribes the kind of measures the miller shall keep, and annexes a penalty for keeping false measures. The Act of 1819, ch. 23, following up the intention and meaning of the Act of 1777, ch. 23, exempts the keepers of grist mills from militia duty, from serving as jurors, and working on roads.

"I quote these provisions of the law to show the character of the use for which the citizen's property is taken, when a part of his land is condemned for the purpose of building a grist mill. It is emphatically a public use for which it is required, and to which it is appropriated. The grist mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding. His duties as a miller are prescribed, and penalties are imposed for a violation of any of those duties; and he is exempted, in consequence of his character of miller, and for the benefit of the public, from the performance of certain duties to which other citizens are subjected. It will appear from what has been said, that when an acre of land is taken from any citizen for the purpose of erecting a grist mill, although the title be vested in another citizen, yet that vestiture is for a public use, and is wholly different from the case of taking property from one man and giving it to another for his private benefit only.

"The question now occurs, Is this application of the character contemplated by the act of 1777, ch. 23? I think it is not. The petitioners say they are desirous to build a grist mill, saw mill, and paper mill. For the erection of these works they ask leave. For these purposes they ask to have Harding's land vested in them. The saw mill and paper mill have no public character; the erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional. The [1]Act of 1777, ch. 23, contemplates no such violation of the rights of one man for the private benefit of another." **11**, 52. *Harding v. Goodlett.* 1832.

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[1] T. & S., 1908; M. & V., 2651.

This Clause Construed — State Has Right to Take Property — Citizen Has Right to Just Compensation for Property Taken for Public Use — How, and in What Way to be Made — Incidental Benefits and Advantages Not to be Considered — True Measure of Damages. — CARUTHERS, J.: "It would, at this day, be worse than useless to enter into a discussion of the existence and the extent of the right of eminent domain, and to prove that it is inherent in this and all other governments. That is now well settled, and admitted on all hands to exist in every State and country. No one now questions the right of the State to take private property for public use, against the consent of the owner. Questions frequently arise, and may come up again, as to the extent and right exercise of this conceded power. But it is not controverted that it applies to the case of public roads, and that railroads, whether constructed by the State or chartered companies, are of that character. The land of the plaintiff has been taken for this purpose, and was, therefore, legally and rightfully taken. But he has a corresponding right, which is as clear, well guarded, and indisputable as the other — a claim for the value of his property. The State may take his property for the public use, but the State must see that the public pays him for it. The people, in whom the sovereign power properly resides in this free country, were not willing to leave this dangerous, though essential, right of eminent domain (a power to deprive a man of his property against his consent) unguarded by barriers of a permanent nature — inserted in their Constitution restrictions upon it. They impliedly delegate the right, but protect the citizen, and secure to him the value of his private property. The provision for this purpose, in the Federal Constitution, is: '*Nor shall private property be taken for public use without just compensation.*' Amendments, art. 5.

"But this, as well as other provisions of the same character, are intended solely as limitations on the exercise of power by the general government, and is not applicable to the legislation of the States. The State Constitutions are framed by different persons, and have distinct objects in view. The State governments are not restricted by the limitation of a power expressed in general terms in the Constitution of the United States. The States must be included in terms, or necessary implication, in such limitation or negation of powers, or they are not affected. Barrow *v.* The Mayor of Baltimore, 7 Pet., 243; 2 J. J. Mar, 45. The Constitution of the United States can not, therefore, be looked to for the rule to govern us in this case. But the people of this State, and perhaps most, if not all, the others, being equally jealous of the abuse of power, saw proper to restrict and limit the power of the State government on the same subject. Our people, in their State convention, make this provision: 'No man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his

representatives, or without just compensation being made therefor.' Art. 1, sec. 21. The power to take private property for 'public use' is here impliedly admitted; and the legislature undoubtedly possess it with the limitation prescribed—that is, by making just compensation. This is only in affirmance of the great principles of the common law. The important, and only, question in this case, is, What is meant by 'just compensation?' How is it to be ascertained; and how, when, and in what paid? When this is settled upon a fair construction of that instrument, it must prevail, and no act of assembly can change or alter it. All laws are subordinate to this supreme law, and must yield to it, as they are null and void when they come in conflict with it. It follows, therefore, that if the legislature attempted, in this charter, to substitute any other compensation for private property taken for this road, or directly, or by indirection, deprived the citizen of that 'just compensation,' in whole or in part, which is secured in the organic law, it has transcended its authority and trespassed upon sacred ground.

"If it should be our opinion that this has been done, it becomes an imperious duty, delicate and unpleasant as it may be, to sustain the Constitution, which we have sworn to support, with a firm hand. That must stand, no matter what else may fall. It must be guarded with untiring and sleepless vigilance from all attacks. Upon the judiciary this important duty devolves. The people can only look to this department of the government for protection, when their constitutional rights are invaded. It should be a pleasant, though delicate, duty, to those they have thus entrusted with the power, to exert it on all proper occasions for their security against wrong. Then, what is the power of the State, and the rights of the citizen, in the question now before us? The former may take the private property of the latter, for public use, as has been done in this case. The citizen has a concomitant right, founded in the Constitution, to a 'just compensation.' How is this right to be asserted? It is certainly the duty of the government to provide some fair and proper mode of ascertaining the value of the property taken, where it can not be agreed upon by the parties, and to make provision, also, for the payment, when it is ascertained in the mode and manner contemplated by the Constitution. The charter of the defendant was granted in 1845, ch. 1. The twenty-fourth section regulates the mode of ascertaining the damages to individuals, and the manner of compensating them for lands taken for the road. It provides that where the land can not be purchased, or the price agreed upon, 'the same may be taken at a valuation, to be made by five commissioners, or a majority of them, to be appointed by the Circuit court of the county where some part of the land, or right of way, is situated,' who shall take an oath 'faithfully and impartially' to discharge the duty assigned them. In making the said valuation the said commissioners

shall take into consideration the loss or damage which may accrue to the owner or owners, in consequence of land being taken or the right of way surrendered, and also the benefit or advantage he may receive from the erection or establishment of the railroad, or work, and shall state particularly by the nature and amount of each, and the excess of loss or damage over and above the benefit and advantage shall form the measure of valuation of said land or right of way. The proceedings of said commissioners, accompanied with a full description of said land, or right of way, shall be returned, under the hands and seals of a majority, to the court from which the commission issued, there to remain of record.' Either party may appeal and have a new valuation by a jury in court, where verdict shall be final unless a new trial is granted. 'And the lands, or right of way, so valued by the commissioners or jury, shall vest in the said company in fee simple, so soon as the valuation may be paid, or, where refused, may be tendered.' It is further provided that an appeal is not to stop the work, nor can the same be delayed by injunction or *supersedeas*. But in case the appeal is by the company, surety must be given to pay whatever may be awarded in the court. Here is a full and vigorous exercise of the power of eminent domain. The fee simple title is vested in the corporation. No objection is made, nor do we see any, under the construction that a jury trial in the regular common law mode is adopted in case of appeal, to the provision made in this section for settling the rights of the parties. But the contested and embarrassing question still arises upon the rule prescribed in this law for ascertaining the 'just compensation' to the owner of the land, the use and title of which he is thus forced to surrender to the corporation. On the one hand, in making the valuation of the land, the '*loss or damages*' which may accrue to the owner by taking the land is to be fixed; on the other, the 'benefit or advantage' to the owner from the erection of the road is to be estimated, and the excess of the former over the latter, in the language of the act, '*shall form the measure of the valuation of said land.*'

"Is this the measure of 'compensation' prescribed in the Constitution? Was the compensation secured to the owner for the loss of his property to be paid in money, or may it be made in other property, or incidental 'benefits and advantages?' Was it intended that the citizens should not only be forced to give up his land for the common or public use, but to take in payment for it anything it might suit the party taking it to offer? If such be the true meaning of the Constitution, it is certainly a poor protection for private rights against the exactions of power, and is only calculated to excite false hopes of security. By the supreme law, the legislature are empowered, where, in their opinion, the good of the whole people requires it, and for the use and benefit of the whole, to compel him who owns the property to give it up, upon

the payment to him, by the same public for whose use it is taken, a 'just compensation,' or, in other words, a fair price, or the value in money, for the property taken. He can not be paid off in 'benefits and advantages,' which are thus forced upon him against his consent. He may be compelled to submit to the encroachment upon his private rights, when they come thus in conflict with the public interest, but, with the charter of his liberties in his hand, he can say to the powers that be, 'Thus far shalt thou come and no farther.' In the appropriation of the property the public power is exhausted. It can not be allowed to prescribe how much and in what he shall be paid. The value of the thing taken must be assessed by a just and proper tribunal, and the amount paid in the lawful coin of the United States—in money.

"It is a debt against those who take the property, and must be paid like all other debts. The creditor, in this case, can not be coerced to receive, as compensation, ameliorations of his remaining property, or the enhancement of its value, nor any other 'benefit or advantage,' either real or imaginary, that may be conferred upon him. He may not wish to part with a portion of his land to have the price of that which remains enhanced. The increase of price, without any improvement of its fertility or beauty, is no advantage to him if he does not wish to sell; it only increases his public burdens in the way of taxation. What others might regard as a great 'advantage and benefit,' he might consider a decided injury. If his lands are appreciated, and his facilities of travel and trade increased, by this improvement, these are benefits to which he is entitled, with the community in general, and for which he has to pay, in common with others, in taxes and other burdens. But there can be no good reason, why any more should be taken from him than others, for these common benefits. Then we arrive at the conclusion that the plaintiff is entitled to the value of the land taken from him by the defendants, in money, and that this value, when ascertained, can not be liquidated, in whole or in part, by any 'benefit or advantage' he may in fact or by supposition derive from the making of the road, in the appreciation of his remaining land, or otherwise. But, on the other hand, it would be unjust to make the public pay the enhanced price that would result from the fact that the road had been located at that place. It is difficult to lay down any very definite rule for the government of commissioners and juries on this subject, which will be of easy practical application in every case. Yet it is highly important that some principle be settled, and the extent of its application to peculiar circumstances defined, calculated to produce uniformity, and rid the subject of that vague and indefinite character which now seems to perplex the minds of those who have to act upon it. We consider the proper rule to be this, that the fair cash value of the land taken for public use, if the owner were willing to sell, and the company desired to buy that par-

ticular quantity, at that place and in that form, would be the measure of compensation. It is not in the nature of a wrongful taking, for which damages are to be assessed. Nor is it a claim for any wrong or damage done; but the appropriation of the property is legal and rightful, as much so as if the owner had voluntarily sold it to the company, and the only open question was: What is a fair price for the property? What is its value? Now, from this definition of the nature of the transaction, it will follow that there can be nothing added to the price on account of the unwillingness of the owner to part with his land, or to have the improvement there, or because he may have to build fences and walls, or be put to inconvenience in getting to his out-buildings, or to have them to remove, or such like inconveniences. These things do not enter into a just idea of a just compensation for the property actually taken, but are incidental to it, and are provided for in another form by this charter, as will be presently shown. These considerations are not to enter into the estimate of the jury, to enhance the price; but, on the other side the value is not to be reduced by the consideration that the improvement about to be made will be advantageous to the owner in the amelioration and enhanced value of his remaining land, the increased facility in travel or trade it will afford him, or the location of a depot or town upon his land. To all these, and such other incidental advantages as may result to him, he is entitled, in common with other citizens; and for which he pays in taxes and other legal burdens imposed by government. If such special advantage accrue to him in consequence of the public improvement and that particular location of the road, it is an incident to his right of property, and a benefit for which no one has a right to make him account, in fixing the price of other property taken against his will. The following circumstances and considerations should enter into this estimate of value or compensation:

"1. The quantity of land taken. It would not be reasonable to fix the price of one acre, or the fourth of an acre, at the general rate of the whole tract, or a larger quantity. This would be selling by retail, and ought to be, at a higher price for the quantity taken.

"2. The place where the land lies which is thus appropriated, with reference to external circumstances. Is it in the country, a village, or city? With reference to remaining land, is it taken on the outer line, with the bed of the road only on the land, or does it run so as to divide the land in a regular or awkward form? Through a garden, stable lot, or the family yard? Between the dwelling house and kitchen, or under either of them? And, if so, are they of great value, or of but little value? Is it so run as to cut off from the main lot a portion of ground that for quantity or form is salable, or not? So, upon this point, the rule must be as first laid down in general terms; the quantity taken, and place and form in which it is taken, must be looked to in fixing its value.

"3. Any general effect that the actual or contemplated erection of the railroad, or special effect of the location of it at that particular place, may have upon the value of that land, whether it had been to improve or lessen the price, is not to form an element or be considered in the valuation. If the value is elevated by the work, he should not have the advantage of it, because we do not make him account for the increased value of the remainder of his land; and if the value is reduced by it, he should not suffer, because he is forced to part with his property for that purpose, against his will.

"4. The incidental advantages and disadvantages, benefits and injuries, are to be left entirely out of view. The owner's unwillingness to sell, or to the location of the road on his land or near his house, on the one hand, and the necessity the public is under to have the land at that particular place, on the other, are to have no influence on the price. The property is to be valued on the same principles and considerations as if both parties had agreed upon the sale, and had referred the single question of the intrinsic value of that particular property to the commissioners. The consideration for his property to which the owner is entitled, being thus ascertained, it must be paid to him in money. To compel him to take anything else would render the constitutional guarantee ineffectual and delusive.

"Here the constitutional provision ends; its inhibition upon the government goes no farther. The legislature may make any regulations it thinks right and proper for an account or estimate of incidental 'loss or damage' or injuries to the landowner. These may consist of the necessity created for the building of new fences, the removal of buildings, separating him from his spring, well, mills, negro houses, barns, etc. And against this may be set off the 'benefits and advantages' to the owner, in the enhancement of the value of his remaining land of the same or any adjoining tract, his increased facilities of travel, etc. We think the legislature has the power to do this; and if required by the petitioner, the court would be bound, under this charter, to direct the commissioners, or, in case of appeal, the jury, to make the estimate on both sides, upon the basis here stated. But this must be separate and distinct from the valuation of the land for the purpose of ascertaining the compensation required by the Constitution, and can not be blended with it, or in any way enlarge or reduce it. It is true that the nature of the items on both sides of this account would be of a very vague and indefinite character, depending, before commissioners, upon their opinions upon the view and examination of the ground, and before a jury, on appeal, upon the opinions and fancy of witnesses. But for that no remedy or definite rule can be furnished which will clear the subject of its inherent difficulties. But this enhancement of the price, which may be taken into account against the petitioner, must be con-

fined, in the estimate, to the lot or tract through which the road runs, or to lots or lands which adjoin it, and to such improvement in value as is the result of running the road at that particular place, and not to the general rise of property in the country, or that neighborhood, produced by the public work. That which is common to all should not be charged to him, because this is an advantage to which he is entitled as a citizen and taxpayer of the State. To these conclusions we are brought by what seems to us a fair construction of our own Constitution. And we find that we are fully sustained in them by the court of appeals of the State of Kentucky, in the case of Jacob *v.* The City of Louisville, 9 Dana, 114. In that case it is stated that the same principles had been adopted in Sutton's Heirs *v.* The City of Louisville, 5 Dana, 28, and in Rice *v.* Nicholasville, Danville & Lancaster Turnpike Company, 7 Id., 81. The language used in the Constitution of Kentucky is substantially the same as ours on this subject." **32**, 431. *Woodfolk v. N., C. & St. L. R. R.* 1852.

Distinction Between Public Necessity and Public Convenience — Illustrations — Power to Take Property, etc., Vested Exclusively in the Legislature, But Courts may Review and Annul Acts Showing Abuse of Legislative Discretion in Giving Property of One Man to Another — Construction of Satutes. — SHACKLEFORD, J.: "We think the provisions of the sections embraced in chapter 10[1] of the Code have no application to works designed alone for private enterprise, how much soever they may be a convenience to the public. To authorize the taking of private property by an act of the legislature, it must be for a public use. What is a public use, does not seem to be very clearly defined. Railroads, turnpikes, public roads, canals, etc., are means of intercommunication between different sections of the State, and are of public use; the streets and alleys of a city or town, are necessary for the use and convenience of the citizens.

"In the case of the West River Bridge Company *v.* Dick et al., 6 How., 547, it was held, it was not enough that there is an act of incorporation, for a bridge or turnpike, or railroad, to make them public, so as to take private property, constitutionally, without the owner's consent; but their uses and objects must be the use of the public, and must, in their essence and character and liabilities, be public, within the meaning of the term public use. . . . There is a distinction between a public use and a public convenience. To authorize the taking of private property for public use, the use must be for the people at large—for travelers, for all—and must also be compulsory by them, and not optional with the corporators—must be a right by the people, and not a favor—must be under public regulations as to tolls, etc., 6 How., 546;

[1] See T. & S., 1325 et seq.; M. & V.. 1549 et seq.

3 Kent, 270. But where it is a public convenience, not a necessity, the right to take private property does not exist. The incorporation of a hotel company in a city, with right to construct lines of a railroad from the hotel to the river or depot, for the accommodation of the guests of the house, would be a public convenience, but would not authorize the legislature to take the private property of the citizens of the town, whereon to erect the hotel, or to lay the lines of railroad. Churches and school houses are public conveniences, but no one ever heard of private property being taken for such purposes. . . . This company is . . . granted the right and privilege to erect . . . such sheds, etc., as may be necessary for the prosecution of their business of hauling freight.

"The erection of these sheds and railroad tracks have no public character, but are wholly for the use of the petitioners. It is an attempt to grant to an incorporated company, for individual purposes, private property dedicated for the use of the citizens of Memphis. It has been held and used for more than a fourth of a century for the purposes for which it was given by the grantors. Though the owner in fee holds lands subject to the right of eminent domain in the State, to be taken for public purposes, he can only be divested of that right when the exigency arises, and it must appear it was for a public use before he can be deprived of it, and that by just compensation.

"It is insisted for the petitioners, it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is for a public use; and it is not within the judicial department of the government to revise or control the intention of the legislature, when expressed in the form of a legal enactment. This question is one by no means free of difficulty. The right of eminent domain remains with the sovereign people of the State, and they have the right to resume the possession of private property in the manner directed by the Constitution and statute laws of the State. Whenever the public necessity requires, it shall be taken for public uses; but who is to judge of this necessity? Mr. Kent, in his Commentaries, says: 'It must undoubtedly rest, as a general rule, in the wisdom of the legislature to determine when the public uses require the assumption of private property; but if they should take it for a purpose not of a public nature—as if the legislature should take the property of A and give it to B—or, if they should vacate a grant of property, or of a franchise, under the pretext of some public use or service, such cases would be gross abuses of their discretion and fraudulent attacks on private right, and the law would be clearly unconstitutional and void. Real property, and the rights and privileges of private corporate bodies, are held by grant or charter from the government; and it would be a violation of contract repugnant to the Constitution of the United States

to interfere with private property except under the limitations which have been mentioned.' 2 Kent, 340. In support of this position he cites 19 Wend., 659; 16 Mass., 330; 3 Yer., 41; 8 Dana's Rep., 289; 1 Reese's South Carolina, 381; 18 Wend., 14; 11 N. H., 19; which, we think, fully sustain the rule.

"The rule, as announced by Mr. Kent, is correct upon principle and authority. The right of private property is under the protection of the Constitution, and the legislature has no power to take it for any private purpose, or to transfer it to another, whether indemnity be provided or not. Any law which has the effect to transfer this right against the owner's consent is void, no matter under what pretext of policy or convenience it may be passed. 2 Swan, 549; 5 Watts & Serg., 171; 5 Page, 146. . . . There is nothing in the charter showing it to be for a public use; there is no restriction on their charges for services; no duties are defined; no penalties for a violation of their duties; no regulations of toll. They are left free to act as private persons, in any manner that will best promote their interests.

"In every case involving the constitutionality of a law passed by the legislature, it is entitled to the most careful consideration of the court, and the acts of the legislature should be examined with every presumption in favor of their validity. But when the court is satisfied they are in violation of the Constitution, it is the imperative duty of the court to declare them void. . . . This attempt by the legislature to exercise the right of eminent domain . . . falls within that class of cases referred to by Mr. Kent. It was an abuse of that discretion vested in the legislature, and an unauthorized violation of private rights. In such cases courts have no discretion; they must declare such acts void." **44**, 422. *Memphis Freight Co. v. Mayor etc. of Memphis.* 1867.

Duties of the Legislative and Judicial Departments in Questions of Eminent Domain, Distinguished—Property May Be Taken Without Notice, When—But Notice of Assessment of Compensation is Compulsory—Delegation of Power.—SMITH, J.: "The taking of private property for public use, is an act of the political power of the State. The necessity or utility of the taking is a question for the legislative department of the government, and exclusively in the control of that department. So far as relates to the question of the utility or necessity of the taking, the courts have no jurisdictive authority, and can exercise no control. Whether the purpose or use for which it is taken is a public use, is another question; and this is considered within the cognizance of the judicial department. Cool. Const. Lim., 538, n. 3, and 540; 21 N. Y., 597; 27 Missouri, 373; 4 Cold., 406. The legislature has the power to take the private property for public use by statute direct, or may delegate the power to agents who may exercise the same discretion, in such manner as the empowering statute may prescribe. The

owner of the property can not contest the right to take the property for a public use. Whether the necessity or utility exist, he can not controvert. The power is absolute with the legislative department of the government, and does not depend on the will of the owner. The property may be taken, if the legislature so choose, without any notice to the owner of the taking or proceeding by which it is taken. The right to notice of the assessment of the compensation is said to be otherwise. To that notice the owner is considered to be entitled of right. Sedg. Stat. and Const. Law, 519; 2 Mich., 427; Cool. Const. Lim., 563. It may be taken before compensation be actually paid to the owner. But, under the Constitution of the State, and also of the United States, the compensation must be made. If an adequate remedy be provided, by which the owner can enforce compensation, that is enough to authorize the property to be taken in the first instance. Such is the settled construction put upon the constitutional law on this subject. 2 Kent Com., 340, n.; 2 Dev. and Batt., 451; Cool. Const. Lim. . . .

"When the legislature takes, or authorizes the taking of private property for public use, as has been before stated, the courts have no power to control the discretion of the legislature, so far as relates to the necessity or utility for taking; and the taking, if for a public use, must be deemed by the courts to be for the public welfare. The establishing of a public highway must be assumed to be for the public welfare. The public welfare requires it to be laid out. It may be done summarily, without notice of the taking to the owner, without his consent and against his will, before compensation, paid or assessed; and the taking is not utterly void; certainly not so void in the first instance as to make the agents of the State trespassers for the taking. . . . It is not designed here to apply the rulings of this case to the proceedings for taking private property for public use other than cases of the kind in hand, where the taking and use is absolutely for the public. How far they may be applicable to proceedings where private property is taken for corporations, to some extent of private character, as railroads and the like, and where the property is to be used for a franchise,[1] and granted such corporation, it is not the purpose of this opinion and decision to determine." 46, 160. *Anderson v. Turbeville.* 1868.

Compensation—How Ascertained—When to Be Paid.

Compensation Need Not Be Made Until After Property is Taken if Payment be Absolutely Certain.—SNEED, J.: "It is the approved opinion that property in this country, when taken for public use, need not be paid for before being taken. It is enough that provision be made for compensation afterwards, provided the payment be absolutely certain.

[1] For instance, see Memphis Freight Co. *v.* Memphis, p. 214.

Smith *v.* Helmn, 7 Barb., 416; 18 Wend., 667; Anderson *v.* Turbeville. The rule is, we think, well stated by Chancellor Walworth, that the compensation must be either ascertained and paid before the property is appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby the owner may obtain his compensation through the medium of the courts of justice. 18 Wend., 9. . . .

"It is stated as settled and fundamental doctrine that government has no right to take private property for public purposes without giving a just compensation, and it seems to be necessarily implied that the indemnity should, in cases which admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain. This point was ably discussed in Thompson *v.* Grand Gulf R. R. Co., 3 How. Miss., 240, and the decision was that compensation must precede the seizure. 2 Kent, 409. Such seems to be the opinion of the learned commentator last cited, but upon this point the authorities are in conflict. *Vide* 12 Serg. and Rawl., 366; 20 Johns., 745; 6 Wend., 634. We have already seen, however, that in this State the indemnity needs not precede the seizure, provided the statute secure it beyond all contingency. And the best security guaranteed under defendant's charter is that the title in the fee remains in the owner until the indemnity is paid." **54**, 537. *White v. N. & N. W. R. R. Co.* 1872.

Benefits Accruing to Other Lands of Proprietor Not to be Considered —Mississippi Act Special Legislation.—SNEED, J.: "The defendant, Stovall, owned real estate disconnected from the tract in question and about one mile distant from it. The charter of the Mississippi Railway Company authorizes the jury to take into consideration the benefits accruing to other lands of the proprietor along the line, but not part and parcel of the tract appropriated. Under this provision, the plaintiff asked instructions that the benefits to other lands of defendants might be set off against the incidental damages claimed by defendants. These instructions were properly refused. This provision of the plaintiff's charter is peculiar to itself, and is a departure from the general rule upon the subject. It is special legislation and obnoxious to the constitutional objections urged against it. The general [1]law provides, that in estimating the damages the jury shall give the value of the land without deduction, but incidental benefits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating the incidental damages. Code, section 1338. In the case of Woodfolk *v.* The Nashville & Chattanooga Railroad Company, 2 Swan, 422, it was settled that the 'just compensation' of the Constitution was the fair value of the land appropriated, which must be actually paid in

[1] M. & V., 1562.

money, and can not be discharged in benefits or ameliorations. But this constitutional guaranty being secured, it is competent for the legislature to award to the citizen, independently of the actual value of the land taken, his incidental damages for the taking, and to prescribe the manner of their assessment, and allow ameliorations and benefits to stand against it. But this applies to the tract upon which the right of eminent domain is actually enforced, and not to such benefits as accrue to other lands of the party, or to the public at large." 59, 4. *P. & M. R. R. Co. v. Stovall.* 1873.

Statutory Provisions Concerning Compensation — Restrictions. — DEADERICK, J., held: "This constitutional provision 'does not exact that the compensation shall precede the taking; it suffices that the law authorizing the taking provides for the compensation and designates an impartial tribunal for its assessment; and it is competent to restrict the property owner to a given time for the enforcement of his rights.'" 59, 621. *Simms v. C. & L. R. R. Co.* 1874.

Remedy Provided by Sec. 1571, M. & V., Not Exclusive — Court of Equity. — FREEMAN, J., held: "The [1]statutory remedy provided by sec. 1347 of Code, is not exclusive, and the land owner is not bound to exhaust that remedy before resorting to a court of equity." In delivering the opinion, he said: "Our Bill of Rights is imperative, sec. 21. . . . 'Compensation must be secured beyond all contingency,' 7 Heis., 538, 541. That is, it must be secured to be paid, or else it can not be said that 'just compensation' has been made therefor. In fact, a strict construction of the language would require actual payment in cash before the taking. It is certain, however, this language can not be complied with, either in letter or spirit, where the land is entered upon and taken, and not only no compensation paid or secured, but the party required to engage in a fruitless litigation with an insolvent company, the result of which would be a judgment only, but no compensation whatever. This would be to take the citizen's land and impose the burden and expense of a lawsuit only by way of compensation, and make the constitutional provision an illusion." 81, 671. *Parker v. E. T., Va. & G. R. R. Co., et al.* 1884.

Measure of Damages — What Constitutes Just Compensation for Land Taken for Public Use. — CALDWELL, J., held: "The 'just compensation' required by our Constitution and laws[2] to be made for lands taken from the owner for public use consists of the fair market value, in cash, of the lands actually taken at the date of their appropriation, estimated as the owner were willing to sell and the taker desired to purchase that particular quantity of land at that place and in that form, together with such incidental damages as result, naturally and proximately, to other

[1] M. & V., 1571.

[2] T. & S., 1338; M. & V., 1562.

lands of same land owner at the date and by reason of such taking, with interest from the date of the actual appropriation of the lands." 88, 510. *Alloway v. Nashville.* 1889.

Persons Entitled to Compensation.

Persons Under Disability Entitled to Compensation.—CARUTHERS, J.: "The right to take land under the power of eminent domain is not restricted by any disabilities of the owner. That would defeat the object of the power, which is, the public necessity to take it for the general good. The power of the State to appropriate the property is unquestioned, but the right of the owner to be paid for it, is secured by the Constitution. The power of the State is subject to no restrictions but that of making compensation. This inherent authority of the government to take private property for public use is exercised without any reference to the private ownership. The existence of infancy, coverture, or other disability, presents no obstacle. The correlative constitutional right to demand and receive the value of the property can only be asserted by the true owner." 40, 65. *E. T., Va. & G. R. R. v. Love.* 1859.

Municipal Corporations—Power to Take Property, etc.

Compensation, Measure of—Fair Cash Value—Benefits—Damages.—NICHOLSON, J., held: "The method prescribed for the appropriation of private property for public use by the State, under the right of eminent domain, is alike applicable to a municipal corporation. If private property is taken for public use, the measure of just compensation, to which the owner is entitled under the Constitution, is the fair cash value of the land, if the owner were willing to sell and the corporation desired to buy that particular quantity at the place and in the form taken. The incidental damages or benefits which result from the use to which the land is to be applied, must form no element in the computation of the owner's compensation."

In delivering the opinion, he referred to the case of Woodfolk *v.* N. & C. R. R. Co., and said: "Although the rules laid down in the case referred to have not been adopted and followed in some of the other States, they have been pursued uniformly in this State, and we are aware of no good reason for departing from them at present." 56, 508. *City of Memphis v. Bolton et al.* 1872.

Municipal Corporations—Police Power—Removing Nuisances.—DEADERICK, J., held: "The [1]act of the legislature which empowers taxing districts to condemn and abate as nuisances all houses which shall be found unhealthy, is not in violation of this provision" which "has no application as a limitation of the exercise of those police powers which are necessary to the safety and tranquility of every well ordered community." 82, 622. *Theilan v. Porter et al.* 1885.

[1] Acts 1879, pp. 15 and 98.

Property Outside of City — Right to Compensation.—TURNEY, J., held: "A person who has occupied and improved property outside of a city has right to compensation where the city has subsequently extended its limits, and in grading a street made necessary by such extension, has knocked down his fences, and caused surface water to overflow his property and injure his cellar, walls and shrubbery." 85, 99. *Gray v. Mayor etc. of Knoxville.* 1886.

Public Roads—Private Way.

Statute Requiring Damages to be Paid or Secured Before Road is Opened Does Not Apply to Road Already Opened — Indictment for Obstruction.—The County court at its April session, 1822, appointed a jury of view to lay off a road through Wetherspoon's land. This was done and the court, at its July session, established it as a public highway. At the April session, 1824, Wetherspoon applied for an order that a jury might be empaneled to view the road and assess his damages under the [1]Act of 1824, ch. 1, sec. 19. This was done. Afterward, he moved the court to either make the trustee pay him the amount of damages or change the location of the road. Both requests being refused, he ran a fence across the road, was indicted and fined.

CATRON, J.: "It is contended, on the part of the plaintiff in error, that, by the Constitution, he can not be deprived of his property for the public use, without compensation being made therefor; and until the compensation is made, he is authorized to occupy and enjoy the exclusive possession of the property. This consequence by no means follows the constitutional provision. It is not a condition precedent that the government shall pay before the property appropriated to public purposes is taken possession of and used by the State. Craigie *v.* Miller, 6 Mass. Rep., 7. The manner of obtaining compensation is pointed out by the [1]Act of 1804, ch. 1, sec. 19. The defendant below attempted to obtain it, but failed, before the County court. If he was dissatisfied with the decision, it was in his power (provided he was injured) to take his cause by *certiorari* to the Circuit court, and by appeal in error to this court, and have the errors corrected. This he failed to do, and therefore he has no right to complain. Yet the proceedings to obtain damages were collateral to the establishment of the road, with which proceedings the public had no concern. The right of the community to the use of the highway established by order of the Circuit court, upon appeal to that court, in February, 1824, was complete. The order was in full force, when the road was obstructed, and conclusive upon all persons, as to the establishment of the road, until reversed, or the road discontinued by the proper authority—the County court; and an

[1] For the two acts referred to, see H. & C., vol. 1, p. 289; Code 1858, 1189, 1190; T. & S., 1189, 1190; M. & V., 1333, 1334.

excuse for its obstruction, is not within the recollection of this court, unless it should be found in the Act of 1825, ch. 17, which is mainly relied upon in the defense, and which we will examine.

"The road was finally established in February, 1824; the act referred to was passed the 31st of October, 1825, nearly two years afterwards. It provides, 'that where a jury of view shall have been ordered by the court, marked and laid off a road over the land of any person, and the owner of the land shall consider him aggrieved thereby, and shall have obtained, agreeably to the laws in force, a jury to assess the damages he may sustain thereby, that it shall not be lawful for such a road to be established as a public highway until the damages so assessed are paid to the person injured, or so provided for as to answer the payment thereof.'

"It is contended that this is a retrospective law, and covers the case of the plaintiff in error. Whether the law is retrospective or not is unnecessary for the court to determine; forasmuch as it plainly applies to cases where orders are made by the County court to have roads reviewed, preparatory to their establishment by confirming the order. If in this case the jury to assess the damages had been applied for, and reported the damages, before the road was established, then a fair case probably would be presented to the court for the application of the provisions of this statute; and the payment of the money, or security thereof to the party injured, would have been a condition precedent to the establishment of the highway; but the legislature could never have meant to annul roads already established. If the desired construction were put upon the act, it is very probable some of the oldest and most public highways in the State might be shut up with impunity. What practice the County courts will adopt upon this statute it is not for this court to say; but that it was intended to apply to cases where a jury of view had condemned the ground over which the highway should lie, before such highway was finally established by order of the court, and an overseer thereof appointed is certain — the Act of 1824 having made ample provision for the assessment of damages, in cases of injury sustained by reason of the location of the roads, after the same are opened by order of the court; and it is believed the only alteration intended to be made by the Act of 1825 was the payment of the damages, or the security of them to be paid, as a condition precedent to the opening of the road; and, therefore, that it does not apply to this case, where the road had been already opened." 8, 119. *Wetherspoon v. The State.* 1827.

Right to Private Property Protected by This Provision — Legislature Has No Power to Take Land of A that B May Have a Private Way Out From His Land, Whether Indemnity be Provided or Not. — The Act of 1811, ch. 60, conferred upon the County court the power to grant "a private way in case the lands of any person be surrounded by the lands

of any other person or persons who refuse to allow a private road over it." TOTTEN, J.: "A way of *necessity* is but a way by grant. If a man sell me land that is wholly surrounded by his own, I am entitled to a way of *necessity* over his land, to come to my own, though it was not expressed in the grant. It is implied as an incident to the grant, and *passes under it.* For, without the way, the grant could have no effect; and it is a general rule that when the use of a thing is granted, everything is granted which is necessary to its proper use and enjoyment. Co. Lit., 56; 2 Com., 56. Sergeant Williams says the *way of necessity* is so called because it is a necessary incident to the grant; and he is of opinion that it is founded entirely upon grant. 1 Saund., 323, note 6; 3 Kent's Com., 424. It is not, therefore, to be taken in a general and independent sense; as, that it is necessary for me to have a right of way over my neighbor's land. I can only have it as in case of other property —by his consent, express or implied. A way of necessity, therefore, like other private ways, is founded in grant by the owner of the land over which it passes; and it can have no existence upon any general idea that it is convenient, or even necessary, to a person to have a private way. Now, the statute confers upon the County court the power to grant a right of way, against the will of the person who owns the land. It takes from him, *in invitum*, a part of his private estate, and gives it to another, as a private right, for such indemnity as a jury may assess. Now, we deny that any such power exists under the Constitution of the State. The right to private property is under the protection of the Constitution, and is to be held as sacred and inviolable. The legislature has no power to take or invade it for any mere private purpose, or to transfer it from one person to another, against the will of the owner, whether indemnity be provided for it or not. The will of the owner is, in this respect, stronger than the legislative power, and if he refuse to grant the private way, we are not aware of any power by which he may be enforced to grant it. If it could be held a valid power in the present instance, so it could be held in many others, under the pretext of necessity, policy or convenience. On the contrary, we consider it a settled doctrine that a law which is intended to have the effect to transfer the private property of one man to another, against his will, is powerless and void, no matter under what pretext of policy or convenience it may be made. *Vide* Bill of Rights; 2 Kent's Com., 13, 339; Wilkinson *v.* Leland, 2 Pet., 659; Varick *v.* Smith, 5 Paige, 5; Hoke *v.* Henderson, 4 Dev., 15; Harding *v.* Goodlett, 3 Yerg., 41. Nor can the power insisted on in the present case be found in the right of eminent domain. This right, inherent in the State, can only be exercised for the public advantage, and not for that of any mere private person. 'The right of eminent domain or inherent sovereign power,' says Mr. Kent, 'gives to the legislature the control of private property for public

uses, and for *public uses only.*' 2 Kent, 339. 'It undoubtedly must rest,' says the same author, 'as a general rule, in the wisdom of the legislature, to determine when public uses require the assumption of private property; but if they should take it for a purpose not of a public nature—as, if the legislature should take the property of A and give it to B—or, if they should vacate a grant of property or of franchise, under the pretext of some public use or service, such cases would be gross abuses of their discretion, and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void.' 2 Kent's Com., 340. In Taylor *v.* Porter, 4 Hill, 140, the precise question now before us was ably considered, and it was held that a statute similar in every respect to ours was unconstitutional and void. Mr. Kent, referring to the judgment in that case, considered that it was founded on just principles, and fully approved it. 2 Kent's Com., 339, note c." McKINNEY, J., dissented on the constitutional question. **32**, 548. [1]*Clack v. White.* 1852.

Opening and Changing Public Highways—Road Law of 1889 Unconstitutional.—The act under consideration was that of 1889, ch. 71, sec. 8. TURNEY, J., held: "The 'road law' of 1889 is unconstitutional to the extent that it provides for the taking of private property for public use in opening and changing the public highways. The fatal defect of this statute is its failure to designate by whom the land owner's damages shall be paid, and to provide an effectual remedy to enforce payment thereof." He said: "The purposes of the Constitution are to place the citizen in a position to demand and receive compensation; that the enabling statutes shall point out the persons who shall pay the compensation, and, at the same time, furnish the remedy for the enforcement of that payment. None of these things are done by the eighth section of the act, and it is therefore unconstitutional and void." **89**, 157. *Tuttle v. Knox County.* 1890.

Impressment of Property in Time of War.

Military Commander Has No Authority to Impress Property—Must be Done by Legislature.—Barrow was a forage master of Major-General Carroll's division of Tennessee militia in the service of the United States, and the division being in great need of forage and corn, the general ordered him to secure it "by pressing" if it could not be had otherwise. Pursuant to this order, Barrow "pressed" corn and fodder belonging to Page, who sued Barrow. Barrow demurred, and the Circuit court sustained the demurrer. On the question whether, under the circumstances, Barrow was justified in making the impressment he did, the court said: "There is a law, founded in extreme and invincible public necessity, which justifies the officer, in promoting the public welfare, to

[1] Reaffirmed without discussion in Rice *v.* Alley, p. 42.

use and even destroy private property without any precedent legal ceremonies; such as demolition, or even burning, of houses to render an attack upon an enemy successful, or to defeat his attempts. For like reasons also may the ground of an individual be occupied, and fortifications be erected and intrenchments be made in it. There *salus populi est suprema lex.* Com. Dig., title Trespass, allow such cause to be a justification. This is the law in extraordinary cases. In all other cases we have a positive and a fundamental law. It is contained within the twenty-first section of our Bill of Rights. . . .

"In the case of an impressment in the late war, caused by a British officer in Canada, the injured party recovered heavy damages against him, though he endeavored to cover himself by the plea of necessity. In the English law, though the impressment of seamen is tolerated by long usage till deemed a part of the common law, yet there are no instances of legal allowance of the impressment of private property, nor any conversion of it to public uses, but by a previous law for the purpose and the intervention of a jury. This clause of our Constitution means that impressments may be made when the legislature shall be of opinion that the public necessity requires them. And when they have authorized them by law, under such regulations to prevent abuse and the oppression of individuals as their wisdom may invent for the purpose, they alone are the judges in all cases contradistinguished from the extreme ones just mentioned. When measures of so much inconvenience shall be resorted to, it is not left, and ought not to be left, to the discretion of a military officer. For, if the general may judge when it is necessary, and put it in practice, so may the next officer, in command at another post, and those of still inferior grade in other parts of the country where stationed, until, at every military post, this despotic measure shall be resorted to, without any rule to restrain excesses, or to prevent oppression and disproportioned exactions. And can any state of despotism be conceived more injurious to the rights of the citizen? Can he be free who is subjected to means so arbitrary?"[1] 6, 99. *Barrow v. Page.* 1818.

Impressment of Property, by Military Commander, Questionable Without First Showing Danger, Etc.—In this case it was held by MILLIGAN, J.: "The authority of a military commander to take or trespass upon private property without first showing by proof some immediate pending danger, or immediate urgent necessity for the public service, is questionable. And so of their authority to dispose of such property when taken or impressed for the benefit of third persons, not connected with the army. Courts can not excuse their trespasses." 45, 95. *Merritt v. Mayor etc. of Nashville.* 1867.

[1] See 46, 594.

Impressment of Property for Army in Field — This Right in the State Depends upon the Police Power, Present Emergency, Necessity, Etc.—ANDREWS, J.: "The right of the State to impress and take private property for the use of an army in the field, and upon the actual theater of military operations, depends upon the police power of the nation, and arises from its obligation to protect the national existence, and the lives and property of its citizens. Like the right to destroy a house in order to arrest a conflagration, it depends upon the present emergency and the existence of a necessity which will not wait for due process of law. The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments." Sedg. Const. Law, 505.

"Undoubtedly the government ought, as far as possible, to protect the property of its citizens, and to make compensation to those whose property has been taken and appropriated to the public use. But the making of compensation in cases like the present is not a condition precedent to the right to take the property, or to the vesting of title thereto in the government. . . . This police power is one without which nations cannot exist. It must be exercised by and through the military agents of the government. Such agents must, in order to the discharge of their duties, exercise a discretion. And that discretion, unless shown to have been wantonly or in bad faith abused, can not be revised by the civil courts. It is true a military commander has no right to take private property without a necessity exist for his doing so. But the law, while active military operations are being carried on, makes him the judge of the necessity; and he cannot be held responsible, in a civil tribunal, for mere errors of judgment. . . . The necessity which justifies the taking in such a case is not that overpowering necessity which admits of no supposable alternative; but, if the vast interests at stake may probably be promoted by the appropriation of the property, it is the right and the duty of the officers, on whom rest the obligation, to omit no useful precaution to take and appropriate it." **46**, 651, *Taylor v. N., C. & St. L. R. R. Co.* 1869.

PERPETUITIES AND MONOPOLIES.

ART. 1, SEC. 22. That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed.
[Same as Const. 1834, art. 1, sec. 22. Const. 1796, art. 11, sec. 23, had "by law" after the word "allowed."]

Perpetuity — Various Common Law Definitions — Corporations — Reasons for this Provision — Charitable Uses — Devise of Property for Benefit of an Educational Institution, Valid. — JOHN MARSHALL, Sp. J.: "By the will the testator appoints his brothers, James Franklin and William Franklin, trustees for the charity and prescribes their duties. . . . The will proceeds in these words: 'And after the death of my aforesaid brothers, it is my will and desire that the aforesaid trusts be continued and pass over forever in the heirs of my said brothers to pass the estate, and that the magistrates of the County court of said county of Sumner, and State of Tennessee, and their successors in office, be hereafter perpetual superintendents of the aforesaid seminary, to see that my intentions be fully carried into effect.' . . . Art. 1, sec. 22, declares that perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed. This, of course, is the paramount of the law. But what is the perpetuity that is not to be allowed? The Constitution neither defines nor describes it, but assumes that what it is is known. We are left, then, to enquire into the common law for a proper understanding of the term. And here we are met by various definitions, descriptions, and representations of a perpetuity and its pernicious consequences, which, with a few exceptions, are calculated to mislead the enquirer. It is said that a perpetual charter of incorporation would be an unlawful perpetuity, because it lasts forever.

"But this would prove, if so, that every grant of land by the State, and every grant and transfer of property, would be perpetuities, because the titles pass forever from the grantors, and the yield of the sales is a perpetual fund, if it may be so called, in the hands of the grantors or those claiming under them, to be used or abused. These are not unlawful perpetuities. Again, it has been said that property held by corporations, with the right of perpetual succession in mortmain, is a perpetuity, as well as property held by corporations as trustees for charitable uses. It must be noted, however, that, when this is said, it is generally meant that when property is so held it is practically inalienable, though not really so, if the corporation or trustees were inclined to sell, or if the proper tribunals were applied to to effect the sale.

"It is true that the reason of the rule against perpetuities and the reason of the policy of the law, in this country, to destroy the entailment of estates and to prevent property from falling into dead or unserviceable hands, is the same, viz.: 'to prevent property from being

withdrawn from commerce and rendered inalienable.' Property may be held by a man himself and his heirs forever, without making the slightest approach to a perpetuity. A perpetuity is defined (Lewis on the Laws of Perpetuities, 164) to be 'a future limitation, whether executory or by way of remainder, and of real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within the period fixed and prescribed by law for the creation of, future interests, and which is not destructible by the persons for the time entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation.' This definition is doubtless correct, and shows what is an unlawful perpetuity. It is manifest that no settlement of property, not made inalienable by the terms of the limitation, is a perpetuity, however likely it may be that it will never be abused.

"It is of the essence of a perpetuity that the property is incapable, beyond the period prescribed by law, of being sold freed from all limitations and trusts, by the use of all the means known to the law for affecting sales. If the charity created by Isaac Franklin shall be established, will the property given by him be in this condition? There are no expressions in the will that render the property inalienable. See 8 Term. Rep., 61. And unless the trust itself implies that the property should be inalienable, it is alienable. It is conceded that an improvident or prejudicial alienation by the trustees would be a breach of trust, for which the trustees would be held responsible, and in some instances the purchaser would be made trustee *in invitum*. The trustees of a charity may sell the property in the proper and *bona fide* execution of the trust, and the court of chancery may decree the sale. Attorney General *v.* Warren, 2 Swanst., 291; Griffin *v.* Graham, 1 Hawks, 96; 7 Paige, 82, 83; Hill on Tr., 463, and authorities cited; Shelford on Mortmain, 677 *et seq.*, and authorities cited. At common law, charitable uses are exempted from the rules against perpetuities. Lewis on Perpetuities, 663 *et seq.*; Attorney General *v.* Hungerford, 2 Cl. & Fin., 357, 374, cited in 2 Kent's Com., 288, note; Griffin *v.* Graham, 1 Hawks, 120. This point again came before the Supreme court of North Carolina in 1842, in the case of The State *v.* Girard, 2 Ired. Eq., 210. Judge GASTON, delivering the opinion of the court, says: 'The objection that the declared trust would establish a perpetuity, and is therefore forbidden by the Constitution of North Carolina, is untenable—the perpetuities thereby contemplated are estates settled for private uses, so as to be inalienable. This is a public charity.' The devise in that case was to the poor of Beaufort county, upon the condition that the lands should never be sold, but leased, not exceeding seven years, etc. The court is, therefore, of opinion that the devises and bequests of the testator to his brothers are valid." **34**, 348. *Franklin et al. v. Armfield et al.* 1854.

Will Directing that Lands be Never Sold, Void.—The will of the testator declared: "I devise and direct that my land be never sold; but that the said association appoint and empower some discreet member of their own body, who shall be authorized to rent and receive rents, and apply the same for the above purposes, as directed, forever." MILLIGAN, J., held: "The devise created a perpetuity, and a court of chancery will not execute it." **42**, 77. *White v. Hale.* 1865.

Devise to the Poor, and for Other Purposes.—Where a will devised a fund, and added: "My object being to make my estate a perpetual annual fund for the poor of Clarksville, and for the purpose of keeping up my graveyard and flower garden," TURNEY, J., held: "It created a perpetuity as to the latter, and to that extent void." **59**, 635. *Hornberger v. Hornberger.* 1874.

Perpetuity — Monopoly — Exclusive Privilege Not Necessarily a Monopoly — Water Companies.—NICHOLSON, J.: "The charter of the Memphis Water Company limits the duration of the corporation to ninety-nine years, with exclusive privilege for thirty years. It does not, therefore, create a perpetuity. Does it create a monopoly by securing to the company the exclusive privilege of supplying the city with water by means of waterworks? We know of no better definition of a monopoly than that given by Lord Coke, and adopted by the Supreme court in the case of Charles River Bridge *v.* Warren Bridge, 11 Peters, 707: 'A monopoly is an exclusive right granted to a few of something which was before of common right—so that it is not a case of monopoly if the subject had not the common right or liberty before to do the act, or possess or enjoy the privilege or franchise granted as a common right.' The question then is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right before their incorporation, in common with all others, to erect waterworks in Memphis, to take up pavements, occupy the streets, and do such things as were necessary and proper in completing their waterworks? It is clear that none had the right to do these things except the city of Memphis, by virtue of its corporate powers; and this right, on the part of the city, was exclusive until it was taken away by the legislature and transferred to the Memphis Water Company. It is no more a monopoly when conferred on the water company than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city, but it was not a monopoly. It is an exclusive privilege in the Memphis Water Company, but not a monopoly. 4 Blachs., 159; 31 Maryl. R., 346." **52**, 529. [1]*City of Memphis v. Memphis Water Co.* 1871.

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[1] See same case, art. 1, sec. 20, p 185; art. 2, sec. 17; art. 11, sec. 8.

ART. 1, SEC. 23. That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance. [Same as Const. 1834, art. 1, sec. 23; Const. 1796, art. 11, sec. 22.]

ART. 1, SEC. 24. That the sure and certain defense of a free people is a well regulated militia; and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority. [Same as Const. 1834, art. 1, sec. 24; Const. 1796, art 11, sec. 24.]

ART. 1, SEC. 25. That no citizen of this State, except such as are employed in the army of the United States or militia in actual service, shall be subjected to punishment under the martial or military law. (That martial law, in the sense of the unrestricted power of military officers or others to dispose of the persons, liberties, or property of the citizen, is inconsistent with the principle of free government, and is not confided to any department of the government of this State.) [Const. 1796, art. 11, sec. 25, did not have the words "or military" between the words "martial" and "law," but Const. 1834, art. 1, sec. 25, did. The clause in parenthesis was in neither of these two Constitutions. In Const. 1796 the word "corporal" appears before the word punishment. With these exceptions both same as above.]

KEEPING AND BEARING ARMS.

Origin and History of this Provision—"Bear Arms"—"Common Defense" Private Broils—Legislative Power—Act Prohibiting Wearing of Bowie Knife..... 230
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"Keep and Bear Arms"—"Carry"—Meaning of—Intent to go Armed—Act of Carrying Not Always Criminal..... 238
Army Pistol—Why Constitution of 1834 was Amended..... 238
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ART. 1, SEC. 26. That the citizens of this State have a right to keep and to bear arms for their common defense; (but the legislature shall have power by law, to regulate the wearing of arms with a view to prevent crime.[1]) [Const. 1796, art. 11, sec. 26 read that "the freemen," (and Const. 1834, art. 1, sec. 26 read that "the free white men") "of this State have a right to keep and to bear arms for their common defense." The clause in parenthesis was in neither of these instruments. For reasons why it was added, see following opinions.]

Origin and History of This Provision—Old English Law Meaning of the Words "Bear Arms" and "Common Defense"—Right to Carry Arms Used in Private Broils Not Secured by this Section—Legislature May Prohibit their Use—Kentucky Constitution—Act Prohibiting the Wearing of a Bowie Knife, Valid.—GREEN, J.: "The plaintiff in error was convicted in the Giles Circuit court for wearing a bowie knife concealed under his clothes, under the [2]Act of 1837–38, ch. 137, sec. 2. . . . It is now insisted that the above act of the legislature is unconstitu-

[1] See **43**, 214, and **84**, 515.

[2] Code 1858, 4746; T. & S., 4746; M. & V., 5522.

tional. . . . In the . . . Declaration of Rights, sec. 26, it is declared 'that the free white men of this State have a right to keep and bear arms for their common defense.' This declaration, it is insisted, gives to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapons he may employ, and, thus armed, to appear wherever he may think proper without molestation or hindrance, and that any law regulating his social conduct, by restraining the use of any weapon or regulating the manner in which it shall be carried, is beyond the legislative competency to enact, and is void. In order to have a just and precise idea of the meaning of the clause of the Constitution under consideration, it will be useful to look at the state of things in the history of our ancestors, and thus comprehend the reason of its introduction into our Constitution.

"By the Act of 22 and 23 Car. II, ch. 25, sec. 3, it is provided that no person who has not lands of the yearly value of £100, other than the son and heir apparent of an esquire, or other person of higher degree, etc., shall be allowed to keep a gun, etc. By this act persons of a certain condition in life were allowed to keep arms, while a large proportion of the people were entirely disarmed. But King James II, by his own arbitrary power and contrary to law, disarmed the Protestant population, and quartered his Catholic soldiers among the people. This, together with other abuses, produced the revolution by which he was compelled to abdicate the throne of England. William and Mary succeeded him, and in the first year of their reign Parliament passed an act recapitulating the abuses which existed during the former reign, and declared the existence of certain rights which they insisted upon as their undoubted privileges. Among these abuses they say, in sec. 5, that he had kept a 'standing army within the kingdom in time of peace without the consent of Parliament, and quartered soldiers contrary to law.' Sec. 6. 'By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.' In the Declaration of Rights that follows, sec. 7 declares that 'the subjects which are Protestant may have arms for their defense suitable to their condition and as allowed by law.' This declaration, although it asserts the right of the Protestants to have arms, does not extend the privilege beyond the terms provided in the act of Charles II, before referred to. 'They may have arms,' says the Parliament, 'suitable to their condition and as allowed by law.' The law, we have seen, only allowed persons of a certain rank to have arms, and consequently this declaration of right had reference to such only. It was in reference to these facts, and to this state of the English law, that the second section of the amendments to the Constitution of the United States was incorporated into that instrument. It declares that 'a well-regulated militia being necessary to the security of a free state,

the right of the people to keep and bear arms shall not be infringed.' In the same view the section under consideration of our own Bill of Rights was adopted.

"The evil that was produced by disarming the people in the time of James II, was that the king, by means of a standing army quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel and illegal measures. Whereas, if the people had retained their arms they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the king to respect their rights or surrender (as he was eventually compelled to do) the government into other hands. No private defense was contemplated, or would have availed anything. If the subjects had been armed they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments. When, therefore, Parliament says that 'subjects which are Protestants may have arms for their defense, suitable to their condition, as allowed by law,' it does not mean for private defense, but, being armed, they may as a body rise up to defend their just rights and compel their rulers to respect the laws. This declaration of right is made in reference to the fact before complained of, that the people had been disarmed, and soldiers had been quartered among them contrary to law. The complaint was against the government. The grievances to which they were thus forced to submit were for the most part of a public character, and could have been redressed only by the people rising up for their common defense to vindicate their rights.

"The section under consideration, in our Bill of Rights, was adopted in reference to these historical facts, and in this point of view its language is most appropriate and expressive. Its words are: 'the free white men of this State have a right to keep and bear arms for their common defense.' It, to be sure, asserts the right much more broadly than the statute of 1 William and Mary. For the right *there* asserted is subject to the disabilities contained in the Act of Charles II. There, lords and esquires, and their sons, and the persons whose yearly income from land amounted to £100, were of suitable condition to keep arms. But, with *us*, every free white man is of suitable condition, and therefore every free white man may *keep and bear arms*. But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the right is secured, the *words* that are employed must completely remove that doubt. It is declared that they may keep and *bear* arms for their *common defense*. The word '*common*,' here used, means, according to Webster: 1. Belonging equally to more than one, or to many indefinitely; 2. Belonging to the public; 3. General; 4. Universal; 5. Public. The object, then, for which the right of keeping and bearing arms is secured is the defense of the *public*. The free

white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the Constitution. The words 'bear arms,' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their *common defense*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defense of the citizens. The right to keep and bear them is not, therefore, secured by the Constitution. . . . The legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defense. The right to keep and bear arms for the common defense is a great political right. It respects the citizens, on the one hand, and the rulers on the other. And although this right must be inviolably preserved, yet it does not follow that the legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed.

"To hold that the legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil of infinitely greater extent to society than would result from abandoning the right itself. . . . The convention, in securing the public political right in question, did not intend to take away from the legislature all power of regulating the social relations of the citizens upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease and where the political right begins, but it is *not* difficult to state a case where the right of legislation would exist. The citizens have the unqualified right to *keep* the weapon, it being of the character before described as being intended by this provision. But the right to *bear arms* is not of that unqualified character. The citizens may bear them for the *common defense*; but it does not follow that they may be borne by an individual, merely to terrify the people or for purposes of private assassination.

And, as the manner in which they are worn and the circumstances under which they are carried indicate to every man the purpose of the wearer, the legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defense. . . .

"The phrase, '*bear arms*,' is used in the [1]Kentucky Constitution as well as in our own, and implies, as has already been suggested, their military use. The twenty-eighth section of our Bill of Rights provides 'that no citizen of this State shall be compelled to *bear arms*, provided he will pay an equivalent, to be ascertained by law.' Here we know that the phrase has a military sense, and no other; and we must infer that it is used in the same sense in the twenty-sixth section, which secures to the citizen the *right to bear arms*. A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had *borne arms*; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane. . . . In the case of Simpson *v.* The State, 5 Yerg., 356, Judge WHYTE, in delivering the opinion of the court, makes use of the general expression that, 'by this clause in the Constitution, an express power is given and secured to all the free citizens in the State to keep and bear arms for their defense, without any qualification whatever as to their kind and nature.' But in that case no question as to the meaning of this provision in the Constitution arose, or was decided by the court, and the expression is only an incidental remark of the judge who delivered the opinion, and, therefore, is entitled to no weight. Upon either of the grounds assumed in this opinion the legislature had the right to pass the law under which the plaintiff in error was convicted." **21**, 156. *Aymette v. The State.* 1840.

Reasons Why the Second Clause of This Section Was Added by the Convention of 1870 — Right to Keep and Bear Arms Involves Right to Purchase and Use — Carrying Dirks, Stilettos, etc., Prohibited — Circumstances Under Which Pistol May be Carried — Question of Proof — Regulation of Use — United States Constitution. — FREEMAN, J.: "What rights are guaranteed by the first clause of this section? . . . We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause. The first clause of sec. 24 says, 'that the sure defense of a free people is a well regulated militia.' We then turn to art. 2 of Amendments to the Constitution of the United States, where we find the same principle laid down in this language: 'A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged.' We find that,

[1]Bliss *v.* Commonwealth (Ky.) 2 Littell, 90.

necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions; in the one, as we have shown, against infringement by the Federal legislature, and in the other, by the legislature of the State. What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this, they were to be allowed to keep arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and, as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land—the body of the militia—shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war, then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness. The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.

"And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the legislature had the right to punish him for it, without violating this clause of the Constitution. But farther than this, it must be held, the right to keep arms involves necessarily the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part. Again, in order to arrive at what is meant by this clause of the State Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is 'arms;' that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good 'the defense of a free people;' and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen

is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot-gun, the musket, and repeater, are such arms; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the legislature. Their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right.

"What limitations, then, may the legislature impose on the use of such arms, under the second clause? . . . In the case Aymette *v.* The State, Judge Greene said, that 'the convention, in securing the public political right in question, did not,' etc.[1] . . . This was said in reference to the clause of the Constitution of 1834. The convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the legislature in this added clause, the right to regulate the wearing of arms, with a view to prevent crime. . . .

"The principle on which all right to regulate the use in public of these articles of property is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member. So may we say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish him for so doing while he uses such arms at home or on his own premises; he may do with his own as he will while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people, through their legislature, shall see fit to impose for the general good. . . . We hold, then, that the [2]Act of the legislature in question, so far as it prohibits the citizen 'either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol,' is constitutional. As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon is included in the designation 'revolver.' We know there is a pistol of that name which

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[1] See p. 233.

[2] Acts 1871, ch. 90; M. & V., 5533.

is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon, skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed. It will be seen that the statute forbids by its terms the carrying of the weapon publicly or privately, without regard to time or place or circumstances, and in effect is an absolute prohibition against keeping such a weapon, and not a regulation of the use of it. Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute. In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It, therefore, in this respect, violates the constitutional right to keep arms and the incidental right to use them in the ordinary mode of using such arms, and is inoperative. If the legislature think proper, they may by a proper law regulate the carrying of this weapon, publicly or abroad, in such a manner as may be deemed most conducive to the public peace and the protection and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained. . . .

"This clause . . . could scarcely be construed to authorize the legislature to prohibit such wearing, where it was clearly shown they were *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense. It might well be maintained they were not worn under such circumstances in order to crime, or that such purpose existed, or that the wearing under the circumstances indicated of a weapon that might lawfully be kept, had any direct tendency to produce crime. On the contrary, the purpose would be to prevent the commission of crime on the part of another." . . .

Held also that "the Constitution of the United States, Art. 2 of Amendments, declaring the right of the citizen to bear arms, is a restriction alone upon the United States, and has no application to the State governments." 50, 177. *Andrews v. The State et al.* 1871. NICHOLSON, J., and DEADERICK, J., concurred in the general views of the opinion. SNEED, J., dissented from so much of the opinion as questioned the right of the legislature to prohibit the wearing of arms of any description, or sought to limit the operation of the Act of 1870. NELSON, J., delivered a dissenting opinion, in which TURNEY, J., concurred.

"Keep and Bear Arms"—"Carry," Meaning of—Intent to Go Armed—Act of Carrying Not Always Criminal.—NICHOLSON, J.: "The question here is, What is the meaning intended by the legislature to be conveyed by the word 'carry?' It will be observed that the prohibitory clause of the Constitution uses the words, 'keep and bear arms,' etc. The legislature has avoided using this language, but has used a word, which, as connected with weapons, conveys the idea of 'wearing weapons,' or 'going armed.' When we use the expression, 'he carries arms,' we mean 'he goes armed,' or 'he wears arms.' This is manifestly the sense in which the word was used by the legislature, and we know of no other single word which could more clearly convey the meaning intended to be conveyed than the word 'carry.' In this sense, Page was not only literally carrying a forbidden weapon, but he was 'carrying' it —that is, 'he was going armed,' contrary to the true meaning of the statute. It will be observed, that the interpretation which we give to the word 'carry' meets and carries out the manifest purposes of the legislature, which was, not only to make criminal the habitual carrying or wearing of dirks, sword canes, Spanish stilettos, belt or pocket pistols, or revolvers, but, also, to make criminal a single act of wearing or carrying one of these weapons, when it is so worn or carried with the intent of thus going armed. But we are far from understanding the legislature as intending to make every act of carrying one of these weapons criminal. Under the Constitution, every man has a right to own and keep these weapons, nor is this right interfered with by the prohibition against 'carrying' them, in the sense in which the legislature uses the word. To constitute the carrying criminal, the intent with which it is carried must be that of going armed, or being armed, or wearing it for the purpose of being armed. . . . It is sufficient here to say, that, without the intent or purpose of being or going armed, the offense described in this statute can not be committed." **50**, 198. *Page v. The State.* 1871.

Constitution of 1834—Why Amended by that of 1870—Carrying of Army Pistol.—NICHOLSON, J.: "The question before us is, Whether the [1]Act of 1871, prohibiting the carrying of an army pistol about the person, publicly or privately, is authorized by this clause? . . . As already indicated, we have no doubt on this question, and hold the act to be clearly constitutional. The Constitution of 1834 contained only the provision securing to the citizen 'the right to keep or bear arms for the common defense.' The additional clause in the Constitution of 1870 was adopted to remove all doubt as to the power of the legislature to regulate the use of the arms which the citizens had a right to keep. It was not intended that the keeping or using of such arms should be prohibited, but that the use thereof by wearing

[1] M. & V., 5529.

or carrying about the person might be so regulated by law as to prevent crime. It was crime resulting from the habit of wearing arms, or of going armed, which the convention sought to prevent, by expressly conferring this power on the legislature. The legislature has deemed it a proper prevention of crime to regulate the use of this arm by prohibiting the wearing of it or carrying it about the person, privately or publicly, unless it be carried openly in the hands, or unless it be worn or carried by an officer or policeman engaged in his duties, or by a traveler on a journey. This was a legitimate exercise of the power to regulate the wearing of the weapon, and is authorized by the Constitution, and does not interfere with the right of keeping the arm, or of bearing it for the common defense." **66**, 62. *State v. Wilburn.* 1872.

Doctrines Announced in Foregoing Opinions Approved — Keep and Bear Arms — Pistols — Minors. — DEADERICK, J.: "The cases of Aymette *v.* The State and Page *v.* The State, . . . sufficiently indicate the difference between the right and the wrong construction of the 'right to keep and bear arms,' etc., and we do not deem it necessary to do more than say that we regard the [1]act to prevent the sale, gift or loan of a pistol or other like dangerous weapon to a minor, not only constitutional as tending to prevent crime, but wise and salutary in all its provisions." **69**, 716. *The State v. Callicutt.* 1878.

ART. 1, SEC. 27. That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner prescribed by law. [Same as Const. 1834, art. 1, sec. 27; Const. 1796, art. 11, sec. 27.]

ART. 1, SEC. 28. That no citizen of this State shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by law.[2] [Same as Const. 1834, art. 1, sec. 28; Const. 1796, art. 11, sec. 28.]

ART. 1, SEC. 29. That an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of this State; it can not, therefore, be conceded to any prince, potentate, power, person or persons whatever. [Same as Const. 1834, art. 1, sec. 29; Const. 1796, art. 11, sec. 29.]

ART. 1, SEC. 30. That no hereditary emoluments, privileges, or honors shall ever be granted or conferred in this State.[3] [Same as Const. 1834, art. 1, sec. 30; Const. 1796, art. 11, sec. 30.]

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[1] T. & S., 4864; M. & V., 5678.

[2] See Aymette *v.* The State, art. 1, sec. 26, p. 230.

[3] See **89**, 535.

LIMITS AND BOUNDARIES.

ART. 1, SEC. 31. That the limits and boundaries of this State being ascertained, it is declared they are as hereafter mentioned—that is to say: Beginning on the extreme height of the Stone mountain, at the place where the line of Virginia intersects it, in latitude thirty-six degrees and thirty minutes north; running thence along the extreme height of the said mountain to the place where Watauga river breaks through it; thence a direct course to the top of the Yellow mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron mountain; from thence along the extreme height of said mountain to the place where Nolichucky river runs through the same; thence to the top of the Bald mountain; thence along the extreme height of said mountain to the Painted Rock on French Broad river; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka mountain, between the Indian towns of Cowee and Oldchota; thence along the main ridge of the said mountain to the southern boundary of this State, as described in the Act of Cession of North Carolina to the United States of America; and that all the territory, lands, and waters lying west of the said line as before mentioned, and contained within the chartered limits of the State of North Carolina are within the boundaries and limits of this State over which the people have the right of exercising sovereignty, and the right of soil, so far as is consistent with the Constitution of the United States, recognizing the Articles of Confederation, the Bill of Rights, and Constitution of North Carolina, the Cession Act of the said State, and the ordinance of Congress, for the government of the territory northwest of the Ohio; provided, nothing herein contained shall extend to affect the claim or claims of individuals to any part of the soil which is recognized to them by the aforesaid Cession Act; [Same as Const. 1796, art. 11, sec. 31.] and, provided also, that the limits and jurisdiction of this State shall extend to any other land and territory now acquired, or that may hereafter be acquired, by contact or agreement with other States or otherwise, although such land and territory are not included within the boundaries hereinbefore designated.[1] [Entire section same as Const. 1834, art. 1, sec. 31.]

North Carolina Land Claims—Cession Act.—MCKINNEY, J.: "The validity of these North Carolina claims is emphatically recognized by the Constitution of Tennessee, art. 1, sec. 31. It is in substance declared, that the sovereignty and right of soil of Tennessee are subject to the conditions and provisions of the Cession Act, and shall not 'extend to affect the claim or claims of individuals to any part of the soil which is recognized to them by the aforesaid Cession Act.'

"The right to the land appropriated by these 'claims,' as before remarked, is derived, not from Tennessee, but from North Carolina. The former was merely invested with the naked power of issuing a grant to the *bona fide* claimant. And even the power to issue the grant

[1] See **57**, 295, and **58**, 351; also **148**, U. S., 503.

is a delegated power, not emanating from her own independent sovereignty, but from the sovereignty of North Carolina. 5 Hay., 113, 117. Independent of the exercise of any power or authority in Tennessee, the owner of the land appropriated under a North Carolina land warrant, may be regarded as invested with an estate in fee simple, merely by force of the Cession Act, and the Acts of Congress, and of the general assembly of Tennessee, passed in pursuance thereof. If these principles be correct, it follows that the legislature does not possess the power to annex a subsequent condition, by which the failure of the claimant to apply for a grant, within a limited period, shall work a forfeiture of his estate.

"Tennessee voluntarily took upon herself the positive, active obligation to perfect the titles, by the issuance of grants upon all *bona fide* claims originating under the provisions of the Cession Act. This duty could have been easily discharged, consistently with her own obligations and the rights of the claimants, by causing the grants to be in fact issued, and, if thought proper, making the necessary expenses, incident to their issuance, a charge upon the lands of the respective owners. But clearly, the legislature, by merely providing for the issuance of a grant, on the application of the owner of the land within a limited time, could not, on the ground of his neglect to demand a grant within the time, destroy the right vested in him by his entry. This is a right which Tennessee did not give, and could not, in this manner, take away. . . . We do not deem it proper, at present, to discuss the question as to the power of the legislature to annex subsequent conditions and limitations in regard to the time within which the enterers of land, deriving their right from the exclusive sovereignty and right of soil in Tennessee, shall perfect their titles. The question, in this aspect, is not before us, and we intimate no opinion upon it." **39**, 481. *Fogg et al. v. Williams et al.* 1859.

ART. 1, SEC. 32. That the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners shall be provided for.

The Constitution of 1796, art. 1, sec. 31, and that of 1834, art. 1, sec. 32, were as follows: "The people residing south of the French Broad and Holston, between the rivers Tennessee and Big Pigeon, are entitled to the right of pre-emption and occupancy in that tract."

In Shields *v.* Walker, **2**, 115 (1811), WHITE, J., held: "Under the Constitution of 1796, the right of pre-emption and occupancy given to certain people residing south of the French Broad and Holston rivers, belonged not to the earliest settler, but to the actual resident at the date of the adoption of the Constitution."

In George *v.* Gamble, **2**, 171 (1811), WHITE, J., held: "The fact that the Indian title had not been extinguished at the date of the Constitution of 1796, did not prevent the operation of the occupant and pre-emption right secured to residents on the land by that instrument."

See also **4**, 102.

SLAVERY AND SERVITUDE.

ART. 1, SEC. 33. That slavery and involuntary servitude, except as a punishment for crime, whereof the parties shall have been duly convicted, are forever prohibited in this State.[1] [Amendment of 1865, art. 1, sec. 1, substantially same as above.]

ART. 1, SEC. 34. The General Assembly shall make no law recognizing the right of property in man. [Amendment of 1865, art. 1, sec. 2, substantially same as above.]

Emancipation Proclamation Void—Slavery Abolished.—NELSON, J., held: "The emancipation proclamation of A. Lincoln was an unconstitutional and void act. . . . Slavery was unquestionably abolished in Tennessee by the Constitution of 1870, if it was not effectually and properly done by the Constitution of 1865."[2] **50**, 653. *Andrews v. Page.* 1871.

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[1] See **42**, 13, 184 and 553; **43**, 9, 123; **44**, 581; **45**, 203.

[2] This opinion contains a valuable and instructive review of the rights of slaves in Tennessee before the emancipation.

The Constitution of 1834, art. 2, sec. 31, read: "The General Assembly shall have no power to pass laws for the emancipation of slaves without the consent of their owner or owners."

The amendment of 1865, schedule, sec. 1, read: "Section thirty-one of the second article of the Constitution, which is as follows: 'The General Assembly shall have no power to pass laws for the emancipation of slaves without the consent of their owner or owners,' is hereby abrogated." See **22**, 496; **45**, 202; **78**, 663.

ARTICLE II.

DISTRIBUTION OF POWERS.

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ARTICLE 2, SECTION 1. The powers of the government shall be divided into three distinct departments: the legislative, executive, and judicial. [Same as Const. 1834, art. 2, sec. 1.]

ART. 2, SEC. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.[1] [Same as Const. 1834, art. 2, sec. 2.]

[1] 9, 454; 92, 432.

Legislative Department.

Legislature Can Do All Things Not Prohibited.—HAYWOOD, J.: "The question is, could the legislature of Tennessee create a banking corporation? To which the answer is, that the legislature of Tennessee, like the legislatures of all other sovereign States, can do all things not prohibited by the Constitution of this State or of the United States, and, amongst other things, may establish a banking corporation, with a capacity to sue and be sued, and, of course, to institute and maintain this action." 7, 270. *Bell v. Bank of Nashville.* 1823.

Inherent Power of the Legislature.—CRABB, J.: "A Constitution, or fundamental law, from its very nature, is brief in its provisions, and confined to the enunciation of first principles. It tells us that an act is to be done, or a result produced, but often pretends not to particularize the time or manner. The latter power is necessarily left to the legislative department, under the high responsibilities which impel and restrain it in all its operations. It is believed that the general assembly have an unquestionable right to supply the mode of executing a power, or a duty devolved by the Constitution in general terms on any citizen or body of citizens in the community; provided that mode do not come in collision with any of the injunctions of the Constitution, and is consistent with all its principles." 8, 291. [1]*The State v. Turk.* 1821.

Act Authorizing Guardian to Sell Lands to Pay Debts of Ancestor is an Exercise of Judicial Power by Legislature, and Void.—GREEN, J.: "The Act of 1825, ch. 154, enacted upon the application of the guardians of the complainants, authorized said guardians to sell the tract of land in controversy for the purpose of raising a fund to pay the debts of complainants' ancestor. In pursuance of its provisions they proceeded to sell the land, on May 18, 1826, to David and Thomas Steel, to whom a conveyance was made. The Steels sold to James Perry, who took possession of the premises and who has since sold to James W. Wheeler. The bill prays that the deed to the Steels may be delivered up to be canceled, that the possession of the land may be delivered to complainants. . . . It is contended that this Act of Assembly is unconstitutional. First, because it is an exercise of judicial authority, and second, because it deprives the complainants of their property without the judgment of their peers or the operation of the law of the land. It is clear that the legislature of this State can not rightfully exercise a judicial power. By the Constitution (at the time this act was passed) it is provided, in art. 6, sec. 1, 'that the judicial power of the State shall be vested in such superior and inferior courts of law and equity as the

[1] See same case in note to art. 7, sec. 2.

legislature shall from time to time direct and establish. Here the whole of the judicial power of the State having been vested in the courts, the assumption of any such power by the legislature would encroach upon the jurisdiction of another co-ordinate department of the government, would transcend the powers entrusted to it, and would consequently be unconstitutional and the act would be void. The question then recurs, Is the act under consideration of a judicial character? It does not partake of the character of a law, for it forms no rule of action of that permanent, uniform, and universal character which Blackstone in his Commentaries, vol. 1, p. 1, says constitute the fundamental principles of municipal law. What is it, then, but a judicial decree? It was enacted upon the avowed ground that the estate of John Jones, deceased, was indebted. What does it do, then, but adjudge the existence of the debts, and decree that the lands be sold for their payment? It is, to be sure, in form a law, but we are unable to see how it differs in substance from a judicial decree; and, if it is in substance a judicial decree, the form in which its makers have thought proper to clothe it can not alter its character.

"The legislature can not sit in judgment, try causes and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power, independent of, and in opposition to, the rules of the law. It is difficult to perceive how an act which determines that the property of a party is liable for a given debt, and that it be sold for the payment of that debt, is not a judicial act; and yet in substance that is the case before us. It is true, the sale is authorized for the payment of debts generally; but that can make no difference as to its judicial character. It is the same thing, in principle, whether there be ten creditors or only one. . . . The legislature is not sovereign; it is not the constituent of the courts, nor are they its agents; and any assumption by the legislature of powers conferred by the Constitution upon the judiciary is as destitute of authority as it would be in the courts were they, instead of adjudging what the law is, to undertake the exercise of legislative powers and to prescribe what it shall be.

"These observations are made in order to show that, as the sovereignty does not rest in the legislature, the power to exercise a guardianship over the estate and persons of infants does not exist in that body. It is the duty, certainly, of the government to protect and provide for those who are incapable of taking care of themselves; but it is the duty of the legislature to pass general laws whereby this may be done." 18, 69. [1]*Jones' Heirs v. Perry et al.* 1836.

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[1] See same case, art. 1, sec. 8, p. 19.

Legislative Interpretation.—GREEN, J.: "It is not the province of the legislature to expound the meaning of previously-existing laws; they can say what shall be the law, but are not authorized to say what it is." **21**, 304. *Clark v. Williams.* 1841.

Upon This Division of Power Rests the Security of the Citizen—Act Directing How a Statute Shall be Construed, Void.—The Act of 1839, ch. 142, sec. 1, p. 235, provided that the first and second sections of the Act of 1835, ch. 15, p. 72, "which require bonds to be executed by sheriffs and their securities for the proper collection and payment of the State and county revenue, shall be construed to require said bonds to be given hereafter every year." JOHN J. WHITE, Sp. J.: "With regard to this section of the act, with the highest respect for the legislature as a co-ordinate branch of the government, we are constrained to say that we regard it as clearly an unconstitutional enactment, and, whenever that is the case, it becomes the solemn duty of the judiciary so to declare it, as the Constitution is the paramount law. The argument upon this point may be stated in few words. Under the Constitution the powers of the government are divided into three distinct departments—the legislative, executive, and judicial. And each department is prohibited from exercising any of the powers properly belonging to either of the others. It is upon this division of power that the security of the citizen, as well as the limitations upon power contained in the Constitution, mainly depend for their preservation. To the legislature belongs the power of enacting such laws, within the limits of the Constitution, as the policy of society and its varying interests may seem to require. But, after their enactment, it is then the province of the judiciary to ascertain their meaning, and determine upon their construction. Any other doctrine would destroy the checks contained in the Constitution against the abuse of power, and tend to a concentration of all power in a single department of the government. It is unnecessary to dwell upon this point farther than merely to say the legislature of 1835 enact a law in reference to the collection of the revenue. That of 1839–40, without repealing that law or enacting a different one, so far as the first section of the act is concerned, which we are now considering, which it was perfectly competent for them to do, undertake to say what is the meaning of the former law, and to decide upon its construction. This, we think, was beyond their power." **24**, 167. *The Governor v. Porter and Sureties.* 1844.

Legislature Has No Power to Discharge a Criminal by Resolution—Cases Distinguished.—TURLEY, J.: "This was a prosecution on behalf of the State against Andrew Fleming and Alfred G. Cosby for retailing spirituous liquors contrary to the provisions of the Act of 1883, ch. 120. Pending the prosecution and before conviction, the legislature passed

the Act of 1846, ch. 90, by which, under certain restrictions, it became lawful to retail spirituous and other liquors. At the same session, and subsequent to the passage of the act, it was resolved that 'no fine, forfeiture or imprisonment should be imposed or recovered for the offense of tippling, under the Act of 1837, and that all causes pending in any of the courts for such offense should be dismissed.' Subsequent to the passage of this statute and resolution, but before their promulgation, the defendants were tried and convicted of the offense with which they were charged in the Circuit court of Rutherford, and fined; before the judgments were executed the defendants, by petition, superseded them upon the ground that the resolution of 1846 freed and discharged them from all responsibility for the offense for which they were indicted, and asked that judgments against them might be vacated. This the circuit judge, upon hearing the petition, directed to be done. From which the attorney general appeals to this court. The question presented for our consideration is whether the resolution of the legislature passed in 1846 is a constitutional exercise of power. And we think it is not. The passage of the Act of 1846, authorizing, under restrictions, the sale of spirituous and other liquors, did not upon any principle operate so as to discharge persons guilty of retailing under the Act of 1838, but they were left liable to punishment under the provisions of the act, and the question reduced to simplicity is this, Can the legislature, by resolution, direct that an individual who stands charged with crime in the court of justice be discharged therefrom? The mere statement of the question, it seems to us, answers it necessarily in the negative.

"The powers of the State of Tennessee are vested in legislative, executive and judicial departments, each separate and distinct from the other, with their power and duties well defined by the Constitution, and by which each is kept within its appropriate sphere of action. The legislature can make the law, but the courts must expound it and execute it, with the aid of the executive, when his action may become necessary for that purpose. The legislature has no power to interfere with the administration of justice, either criminal or civil, in the courts; a resolution that a criminal, or a class of criminals, shall be discharged by the court is then necessarily an assumption of power not warranted. After conviction the governor may pardon, but, before conviction, the attorney general and the court are the only power that can discharge without acquittal, and this by *nolle prosequi*. We are, therefore, constrained to hold that the resolution under which these defendants claimed their discharge is void for want of power in the legislature to pass it. The case is not similar to that of the School Commissioners *v.* McEwen, in which we held that the legislature might release, by resolution, a debt due to the State, which we have again held at this term of the court in the case of Pepper *v.* The State. If the legislature had

passed a resolution releasing the funds due to the State by judgment after conviction, in the cases sought to be provided for, instead of directing that they should be discharged, it would have fallen with the principles of the cases referred to, and would have been a constitutional exercise of power which would be enforced by the courts." **26**, 153. *The State v. Fleming et al.* 1846.

Legislature May Make Laws at Its Discretion — Parties Insisting Upon Unconstitutionality of an Act Must Point Out Clause—Speculating in Witness Fees — Art. 1, Sec. 8; Art. 11, Sec. 8.—An [1]act to prohibit speculation in witness fees and other fees originating in courts, passed March 31, 1879, ch. 40, was considered in this case. COOPER, J.: "The defense is rested upon the unconstitutionality of the act, and the argument submitted in support thereof is made to turn on general principles, rather than on any specific provisions of the Constitution. The right of the citizen to freely dispose of his property, and the absence of substantial evil to be met by the legislation, have been more discussed than the inherent power of the legislature. It is the settled rule in this State, as in the United States generally, that the legislature has unlimited power of legislation, except so far as it is restrained by the Constitution of the United States, and the Constitution of the State of Tennessee. Hope *v.* Deaderick, Bell *v.* Bank of Nashville. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion. They who insist upon the unconstitutionality of an act must point out the specific provision of the Constitution which is violated.[2] The court can only interpose upon a plain violation of some positive provision of the organic law. Whether a statute is 'contrary to the genius of a free people,' is a question for the legislator, not the judge. It can not be annulled upon supposed natural equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the Constitution beyond its plain and obvious import.

"The only citation from the Constitution made in the argument is the eighth section of the Bill of Rights. . . . And it is argued that the act in question, although in form a prohibition, against the purchase of fees of witnesses, is in fact a restraint upon the free disposition by the witness of the fees as property, and *pro tanto* a deprivation of an important element of property. But the claim of a witness for the fees allowed him by law is only a chose in action, not assignable by the common law. The legislature has made such claims assignable, and it is clearly within its competency to take away that quality. With either the wisdom or policy of such legislation the courts have nothing to do. . . . If

[1] See Acts 1879, ch. 210, sec. 1.

[2] See Chadwell *v.* Jones, Tenn. Chc'y. Rep., vol. 1, p. 493.

there is any provision of the Constitution which can be considered as contravened by the act in question, it is art. 11, sec. 8. . . . But it is obvious that this clause of the Constitution only prohibits the suspension of a general law, or the grant of privileges, immunities or exemptions to an 'individual' or 'individuals.' It does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class. . . . The act under consideration was intended to prevent speculation in witness fees. It makes the purchase of such fees for less than their face value a misdemeanor, but, it is added, the provisions of the act shall not apply to witness fees traded for merchandise or hotel bills. . . . The legislature intended to break up a particular kind of speculation in these fees, which it thought detrimental to the public interest, without interfering unreasonably with the witness' right of using the fees in the ordinary course of business. Of the wisdom of the legislation, the law-making power is the exclusive judge. Our duty is to enforce it, if not violative of the organic law." The act was declared constitutional. 71, 376. *Davis v. The State.* 1879.

Legislature Can Not Direct How Statutes Shall be Construed — How to be Construed With Reference to the Constitution. — In this case the Supreme court made the opinion of BAXTER, circuit judge, its opinion. Judge BAXTER said: "The legislature has not the constitutional power to construe a statute, or to give a mandate to the courts as to how they shall construe them, and, if the Act of the 5th of July was nothing more than such a mandate, it was unconstitutional and void, and would not require to be repealed to render it invalid. The courts will never construe a statute unconstitutional if it will admit of any reasonable construction consistent with the Constitution. In construing statutes, we look at the objects aimed at by the legislature, and not to the particular verbiage in which a statute, in some of its parts, may be expressed. If the real object aimed at is within legislative competency, and can be clearly seen from the whole statute taken together, the history of the prior legislation upon the same subject, the court will not be turned aside by particular expressions, which, taken by themselves, might seem to indicate that the legislature was assuming to transcend its constitutional power, but will give effect to the will of the legislature thus discovered. . . .

"It is most manifest that it was not the deliberate intention of the legislature, by the Act of July 7th, to repeal the Act of July 5th. Both acts were before the legislature at the same time, there being but two days' difference in their dates. It is provided by the Constitution that every bill shall be read once on three different days, and passed each time, in the house where it originated, before transmission to the other house. No bill shall become a law until it shall have been read and

passed on three different days in each house, etc. It follows that the Act of July 5th must have been passed after the Act of July 7th had passed at least four, and perhaps five, readings before the same legislature; and can it be supposed that the legislature would have been guilty of the consummate folly of passing an act at a time when they had a bill repealing it, which had already passed four (perhaps five) readings? It would seem to be altogether disrespectful to the legislature to impute to it such folly. If the legislature had intended to repeal the Act of July 5th, why should they pass it? Why not vote it down? It can not be answered that after its passage the views of the legislature underwent a change, because the repealing statute had been framed and passed several readings before the final passage of the act which it is insisted was repealed. I, therefore, feel well assured that the legislature did not intend to repeal the Act of July 5, 1870, and if the Act of July 7th is susceptible of that construction, it was an inadvertence, and not the intention, of the legislature." 60, 317. *Arrington Trustee v. Cotton.* 1872.

Supreme Court—Judgment of When Court is Equally Divided—Legislature Can Not Direct How it Shall Be.—The question was the constitutionality of the Act of March 6, 1875, providing "that in all cases now pending in the Supreme court, or hereafter brought thereto, in which the judges shall be equally divided, the judgment shall be determined as follows: "If the case depend upon the constitutionality of any act of the general assembly, then such judgment or decree shall be in favor of the validity of such an act. In all other cases the judgment or decree of the court below shall be affirmed."

By section 2 of the schedule to the Constitution of 1870, it was provided that six judges should compose this court until there should be a vacancy occurring after January 1, 1873. FREEMAN, J.: "The question is, had the legislature the power under the Constitution to enact what judgment should be rendered in such cases? . . . The court thus constituted was the supreme judicial tribunal of this department of the government. Its function was to decide all cases on the law and facts that might be brought before it in accordance with the jurisdiction conferred by the Constitution. In accordance with the genius of such an organization, a majority of the court would be required to render a decision, for if this was not the case, then a minority might do it, a conclusion to which no one, we take it, would assent. In any court, however, whatever decree the court shall give must be the result of its own judgment in performance of the functions assigned it by the Constitution. No other department of the government has the right to indicate or dictate what the judgment shall be. This would be to usurp the judicial function, confided exclusively by the Constitution to the judicial department.

"Whether the legislature might or might not have enacted a rule for the government of the court on this subject in the future, may be possibly a different question, but that it could prescribe what the court should do in cases then before the court, we think it beyond all question to overstep the line limiting their power under the Constitution. However, we may say, it would seem difficult to distinguish in principle between the two cases, that is, on an enactment operating on cases then pending, and on future cases. In either case, it is not to prescribe a rule of future conduct to the citizen, which is the essential element of the law operating on the rights of a citizen, but would be to dictate a judgment for the court not based on the law and facts in the case, but upon a certain state of opinion as held by the judges of the court, in which a certain result is required to be entered as the judgment of the court. This judgment, it is evident, would be the judgment or the result declared by the legislature, and not by the court. In addition, if the legislature should say an affirmance should be the result of an equal division of the members of the court in opinion, why not with the same propriety say that a minority should govern; or that the then oldest judges agreeing, or the then youngest; or, to reduce it to an absurdity, the three judges who should weigh the most; or any other arbitrary rule that body might choose to adopt? We can not see where the limit shall be fixed in such a case, except at the discretion of the legislature, if we once admit they can fix any rule at all on the subject. It may as well have been required that the opinion of the chief justice should have the right to decide the case, or his opinion should be the basis of the decree, or that a certain decree should be rendered because the court could not agree upon one for itself. This last is certainly the leading feature of the law before us, that is, where the court can not agree upon an opinion or judgment, one is presented by the legislature arbitrarily, regardless of the merits of the case before the court. This certainly is a usurpation of the judicial function, and far from the true principle of legislative or law-making action. . . .

"The result would be that at one term, under the direction of the legislature, the court would enter up a judgment giving the party a decree in his favor in a certain state of facts, or holding a certain law to be constitutional and valid. At the next term, on precisely the same state of facts, upon further consideration the court in its opinion would hold a different judgment should be the result of these facts; and in the other case, that the same law was unconstitutional and void. It may be said, the court in any case or either case might change its opinion and overrule its former holding. This is very true, but in the one case, it would be the reversal or overruling the opinion or mandate of the legislature; in the other the opinion of the court, as formerly announced. It could not be said in the first case that the court had

changed its opinion or overruled the law as held in the former opinion, because the court had given no such an opinion, had made no such ruling as the law; while in the other, this would accurately express what was done. This view brings out clearly the true idea that underlies this enactment, that is, that the judgment required to be rendered is that of the legislature and not of the court nominally rendering it. We hold, therefore, the act to be void for these reasons." [1]Tenn. Leg. Rep., vol. 1, p. 15. *Perkins Trustee v. Scales et al.* 1877.

Limits of the Judiciary — Legislative Policy. — COOPER, J.: "Very earnest and able arguments have been submitted by the learned counsel of the complainants upon the policy of the State, county and incorporated towns being all allowed to tax a citizen for school purposes, thus subjecting him to be thrice taxed for the benefit of education. It has been earnestly insisted that the system authorized in this case is not for the best interest of the inhabitants of the town corporation, and works oppressively. But, of course, the courts have nothing to do with the policy of the laws, and can not interfere merely because in some instances they may work harshly. These are arguments to be submitted to the law-making power, or to the people, to influence them in selecting their representatives, both in the State legislature and the corporation council. Our duty is limited to pronouncing on the constitutionality of the act. We are expressly forbidden by the Constitution itself to exercise any of the powers properly belonging to the legislative department." **83**, 649. [2]*Ballentine v. Mayor etc. of Pulaski.* 1885.

Legislation Procured by Fraud and Bribery.

No Judicial Action Can be Based on a Ground So Derogatory to a Co-ordinate Branch of the Government.—CARUTHERS, J.: "This suit was brought and recovery had upon a bill of exchange held by the plaintiff below, as a corporation, against the defendant. Several questions are made in defense. 1. That the charter was fraudulently obtained. 2. The act was passed without taking the ayes and noes on the last reading. 3. That it was repealed by the legislature at its last session and before the trial of this suit, and therefore no recovery could be had, as the corporation was dissolved.

"On the first point, it is urged that some one or more members of the legislature of 1853–4, whose names are not given, offered sections 68 to 75, as amendments to an act entitled 'An Act to incorporate the Ætna Mining and Manufacturing Company, and for other purposes,' incorporating this and another company for mining and manufacturing

[1] See Mayor etc. of Chattanooga *v.* N. & C. R. R. Co., art. 2, sec. 28.

[2] See same case, art. 1, sec. 8, p. 62; art. 2, sec. 17; art. 2, sec. 28; art. 2, sec. 29; art. 11, sec. 8; art. 11, sec. 12.

purposes, which sections, after enumerating the ordinary powers of a corporation, have the following enlarging and amplifying clause, that whenever the said companies are 'organized according to the provisions of the foregoing sections, in addition to the powers therein enumerated, they *shall have all the powers, franchises, rights, privileges, and immunities conferred upon the corporation and body politic created by an act passed December 27, 1843, ch. 60.*' By reference to the Act of 1843, ch. 60, it is found to be 'An Act to charter the Bank of East Tennessee.' The argument is that these sections were designed and fraudulently offered in the hurry of legislation, and on the third reading of the bill, and that they were voted for by a majority, without reference to the Act of 1843, and without knowing that they were creating two new banks. There are some insurmountable obstacles to arriving at this conclusion, although it must be admitted it is strongly favored by the surrounding circumstances. In the first place, it can not be presumed that any one honored with a seat in the legislature would be so corrupt as to knowingly and designedly attempt such a fraud and imposition; and, secondly, that both the majority and minority were so ignorant, or careless, in the discharge of their duties as not to know the powers they were conferring upon these new corporations by the adoption of the acts to which reference was made. The hypothesis assumed—that is, that a part of the law-making body were capable of an attempt to dupe and deceive their fellows, and that the latter could be thus imposed upon in the discharge of the important trusts confided to them by their constituents—would, if established, be calculated to destroy all confidence in that most vital and important branch of the government.

"No judicial action, then, can be based upon a ground so derogatory to a co-ordinate department, and so destructive of all confidence in the representative system. . . . We need not, nor do we, say now whether a case could or could not be made out which would authorize the courts to disregard an act of the assembly upon the ground of fraud and imposition in procuring its passage. This case does not, in its facts, call for a discussion or any opinion on that question."[2] **53**, 623. [1]*Ferguson v. Miners and Manufacturers' Bank.* 1856.

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[1] See same case, art. 2, sec. 18; art. 2, sec. 21; art. 11, sec. 8.

[2] The Reporter on p. 625, quotes from Fletcher *v.* Peck, 6 Cranch, 87, the language of Chief Justice MARSHALL on this question as follows: "That corruption should find its way into the government of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would in any case be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired under that contract by third persons, having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still there would be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient?

No Department Can Sit in Judgment Upon the Conduct of Another —Each Supreme in Its Sphere—Passage of Law by Corrupt Means—Remedy is to Repeal It—Duty of the Governor—Extra Session.—One question here was, had the court jurisdiction, upon proof of allegations that a bill had been passed by corrupt means to set the law aside? McFARLAND, J.: "I am satisfied, upon the most careful consideration, that it has not. This seems to me to be manifest from the organization of our form of government. The government of the State is divided into three departments—the executive, legislative, and judicial. The three combined represent the entire sovereignty of the State. Powers vested exclusively in one department, can not rightfully be exercised by the other. The legislative power is certainly vested in the general assembly, and it is certain that the courts can exercise no part of this power; nor can either of these departments rightfully undertake to determine with what degree of fidelity the other has met its obligations. For this court to exercise the jurisdiction invoked, would be to assume that the co-ordinate departments of the government are liable to corruption, but we are not. If we were to take jurisdiction, and determine that this act was passed by bribery and corruption, the legislature would have the same right to enquire whether or not our judgment was procured by the same means. These departments, within their spheres, are so far omnipotent that they possess all the powers of the State belonging to that department, and in the exercise of these powers they are independent, neither being subject to the will or supervision of the other. The members of the general assembly, like the members of this court, are responsible to the people who elected them for the manner in which they discharge their trust; and they may be impeached in the manner pointed out by the Constitution. The people may relieve themselves of the consequences of the corrupt and faithless acts of their representatives, but it was never contemplated that one department should sit in judgment upon the conduct of the other. If so, we might set aside pardons granted by the executive, upon the ground that they were corruptly granted, and the executive department might in turn refuse to permit our judgments to be executed, upon the ground that they were corruptly rendered; and from the collision and conflict, confusion and chaos would result. If we should take jurisdiction of this question, and an issue of fact be formed, it would then have to be tried

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Must the vitiating cause operate on a majority, or on what number of members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

"If a majority of the legislature be corrupt, it may well be doubted whether it be within the province of the judiciary to control their conduct; and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned. . . . It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, can not sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law."

upon the rules of testimony applicable to civil cases; only, a preponderance would be necessary to establish the allegations of the bill, or, as held by a majority of this court, only a slight preponderance; so that, if it be shown by a slight preponderance of testimony that one of the senators who voted for this bill was corrupted, we would then be compelled to declare that the act was not the will of the legislature, although, it could not appear that the bribed member might, notwithstanding the bribe, have voted for the bill, and notwithstanding the bill was passed with all the forms of law. And, besides, this result would be reached in a case to which neither the State or the impeached member is a party, or has the right to be heard, and where we would have no right to consider whether improper influences may have affected the other side of the controversy. . . . The remedy, where the passage of a law has been improperly obtained, is to repeal it, either by the same or by some succeeding legislature, and the wrong sustained in the meantime is generally not irreparable; and, besides, the remedy, by repealing the law, can be more promptly applied by the legislature than by the courts. . . . If satisfied that the law was procured by bribery, it is a question for the consideration of the governor as to whether or not he will call the legislature together on the subject, and for that body to determine whether, for this or any other reason, the law should be repealed. It does not meet the question to say that they will not perform this duty. They have the power; we have not. And even after the law has been executed, and the bonds issued, if it should appear that, by corruption and bribery, an unjust debt has been assumed in the name of the State, its good faith and honor would not require the obligation to be met; and whether it would or not, would be a question for the people, through their representatives to consider, as the State is sovereign and can not be coerced. So that, whether future legislatures would recognize the obligation, would be a question for them, and the people in their sovereign capacity need no relief from the courts." Judge FREEMAN dissented, and Judge TURNEY expressed no opinion. 76, 229. [1]*Lynn et al. v. Polk et al.* 1881.

Statutes — Passage of — Fraud — Motive — Repeal. — The act considered was that of 1890 (extra session) ch. 33. CALDWELL, J.: "It is alleged that this act was conceived, and its passage procured by private persons for sinister motives; that the lines were irregularly and arbitrarily run (as described on the first page of this opinion) for the purpose of oppressing complainants by including their property, and favoring certain rich corporations and wealthy persons by excluding their property; that this was the result of an agreement between the persons and corporations to be excluded and a few members of the

[1] See same case, art. 1, sec. 17, p. 128, and art. 1, sec. 20, p. 199.

legislature, and was a *fraud* on the legislature and on the rights of the property owners included. The facts here charged, if admitted to be true (as they are by the demurrer) do not render the act void.

"That a bill is inspired by private persons for their own advantage, and to the detriment of others, is clearly not a sufficient reason for holding the law void when passed. Nor can the courts annul a statute because the legislature passing it was imposed upon and misled by a few of its members in conjunction with interested third parties. If the act in question is unwise and oppressive, the evil may be remedied by repeal or amendment. The courts have nothing to do with the policy of legislation, nor the motives with which it is made." 89, 495. [1]*Williams v. Nashville.* 1891.

The Executive Department.

The State—Its Nature—Being an Ideality it Can Only be Conceived of Through Its Functionaries—The Governor of the State is a Corporation Sole—Bonds Made Payable to Him.—TURLEY, J. "The Governor constitutes the executive department of the State; he is vested by the Constitution of the State with great and important powers to be executed for the benefit of the State, and it is absolutely necessary that there should be no interregnum in his office, to avoid many and great inconveniences; this can not be unless we apply to him the maxim of the common law, applicable to the king, that he never dies; this maxim of the common law (like most if not all of them) is based upon wise conceptions, and not upon any foolish reverence for kings or belief in their sanctity or immunity from the common lot of mankind, but upon the necessary assumption that the State, which protects and cares for all, never ceases to exist, but that it is always alive and active in the performance of its duties to the citizen. The State, being an ideality, can only be conceived of through the public functionaries who constitute the different departments by which it exists; therefore to hold that it never dies is necessarily to hold that those who constitute its necessary departments never die; the departments by which the government of Great Britain exists are the king and houses of parliament; the king is the executive of the nation, and he and the two houses of parliament are the legislature; there is never in contemplation of law an interregnum in either of these departments, for the law-making and the law-executing power being absolutely necessary to the existence of the State, if they cease to be, the State *pro tempore* ceases to exist, which would be a solecism in a government not destroyed by invasion or rebellion, and thrown back upon the primitive principles of society. The governor of this State is the executive of it; it is one of his duties,

[1] See same case, art. 1, sec. 8, p. 63; art. 2, sec. 19; art. 11, sec. 8.

among many others, to see that the laws of the State are executed and obeyed; this is a great and fundamental duty, without the proper observance of which society might and would necessarily be greatly distracted, and the proper security of life, liberty, and property seriously endangered for the purpose of enforcing the execution of the laws, and the protection of the State from rebellion and invasion; he is the commander of the forces of the State; to hold that there can be an interregnum in this office would be to hold to the temporary anarchy of the State; and in order to hold that there is no such interregnum we must hold that the governor, as such, never dies; to do this he must be a corporation sole, with succession in office. Such we think he is, constituted so by the organization of our State government, and not by any particular statute or statutes; and therefore when bonds are directed to be made payable to him in his official capacity, they are payable to him in his capacity as a corporation sole *quoad* that particular transaction." 27, 181. *The Governor v. Allen et al.* 1847.

Repugnancy to the Spirit of the Constitution — Exercise of Judicial Power by the Governor — Act Empowering Him to Annul Registration of a County, Void.—SMITH, J.: "This court does not entertain the notion that it is authorized to declare a statute void, because of repugnancy to the *spirit* of the Constitution. Considerations of this kind, are properly addressed to the legislative body. Courts only act, when the conflict is shown with an express provision of the organic law, or with a necessary implication from an express provision. Instances of such implication are found in cases, as when the delegation of an express power to one department of the government, is held to be by necessary implication, the prohibition of the exercise of the power by another department; or when the delegation of a power to the national government, is held to be the negation of the power to the State government. It is scarcely necessary, however, to resort to implication, in the aspect of the case proposed to be shown, to find valid ground on which to rest the objection to the organic validity of the act under consideration.

"The form and plan of the Constitution of the State, expressed in the whole and in the parts, declare, organize and establish, a system and form of government, popular, elective, republican, wherein sovereignty is in the electoral body of the people. This is expressed in and by the clauses which delegate, reserve, restrain and distribute the powers of government among the several departments and officers, for the purpose of maintaining and enforcing checks and balances upon the several functionaries, and so securing the liberties and rights of the people, and a popular, elective and republican form of government. The statute which empowers the governor, in his discretion, practically and effectually to abrogate the right to vote, of any and every qualified citizen of the State; and at any time and for all time, and in any and

all elections, is repugnant to that portion of the Constitution which is expressly ordained to secure to the people, the right to elect the officers of the government.

"The statute which practically and effectually empowers the governor to determine who, of the qualified citizens, shall vote and who shall not vote, and who shall elect and who shall not elect, the officers of the government, himself included, is repugnant to that portion of the organic frame of the government, which was ordained to establish and maintain a republican form of government. The statute which empowers the governor, practically and effectually to divest out of any and every qualified voter, his right to vote, not only once, but from time to time, and without end, is repugnant to those provisions of the organic law which are ordained to invest the courts with judicial power, and to exclude the executive head of the government from the exercise of such power. For these reasons, the court is constrained to hold, that the statute which confers on the governor the power to set aside and annul the registration of a county, in whole or in part, is unconstitutional and void. In this determination, are included the Act of March 8, 1867, ch. 36, secs. 4 and 5; and that part of the Act of February 26, 1868, ch. 52, so far as it authorizes the governor to set aside registration, and undertakes to confirm his acts of this kind, done before the passage of the act; and to punish persons who vote, or who attempt to vote, 'by virtue of certificates issued from a registration declared null and void' by the governor." 46, 252. [1]*The State v. Staten.* 1869.

Courts Have No Power to Issue a Writ of Mandamus Against the Governor — Reasons for This, and Results if Otherwise — Doctrines in Other States. — McFARLAND, J.: "Have the courts of this State any jurisdiction by *mandamus* to compel the governor to perform any duty devolved upon him as governor by the Constitution and the laws? As to purely executive or political functions devolving upon the chief executive officer of a State, or as to duties necessarily involving the exercise of official judgment and discretion, we think it may be safely assumed that *mandamus* will not lie. This necessarily results from the nature of a government having three independent departments—executive, legislative and judicial. Such is the doctrine well settled by authority. See High on Extraordinary Remedies, sec. 118. . . . The Supreme courts of Ohio, Alabama, California, Maryland and North Carolina have decided in favor of the jurisdiction in cases where it was claimed the duties were ministerial, the cases presenting the question in different aspects; while opposed to the jurisdiction are the Supreme courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey, Rhode Island and Missouri. We will not undertake to review the sev-

[1] See same case and note, art. 1, sec. 8, p. 42; art. 4, sec. 1.

eral cases, or to distinguish them. We have, however, examined the reasoning in the several cases, and our own convictions are decidedly against the exercise of the jurisdiction, and we are of opinion that there can, as to its exercise, be no sound distinction in respect to the character of the act to be performed by the governor as chief executive.

"In the very nature of such a government each department within its sphere must be independent of the other, and neither can rightfully interfere with the others in the discharge of their appropriate duties. And whatever duty or function is devolved upon either department becomes a part of its appropriate or exclusive duties. And in the case of the governor it does not change the result that the duty might have been imposed upon a ministerial officer, and if imposed upon a ministerial officer, he might have been compelled to perform it. It does not follow that when the duty is imposed upon the governor, the courts have jurisdiction to control his acts. The governor holds but one office, that is the office of chief executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the chief executive and independent department of the government; as to other duties he would be a mere ministerial officer, subject to the mandate of any judge of the State, and we must assume also that the judge would have the power to imprison the governor if he refused to obey his order, for if the court has this jurisdiction, the power to enforce the judgment must follow.

"It is said if this jurisdiction be not granted there is no remedy in cases where the governor refuses to perform his duty with respect to the rights of the citizens. If the duty of performing a certain act is by law devolved upon the governor, and in the exercise of his judgment and discretion — and it is difficult to imagine any act to be performed by a governor where some degree of judgment and discretion is not involved — he decides against the claim of the citizen, the citizen has had his remedy. If the governor corruptly act in violation of law and right, he may be impeached. It does not follow because the right claimed depends upon a construction of our laws that the courts must therefore decide it. The courts can only decide in those cases where by law they have jurisdiction." 67, 491. *Turnpike Co. v. Brown.* 1875.

Mandamus — Duties, Executive and Political — Province of Courts. — This was a bill filed by Creed F. Bates to compel Governor R. L. Taylor to deliver to him a certificate of election and to prevent the issuance of one to H. Clay Evans, the other applicant. CALDWELL, J.: "It is well settled by all the authorities that *mandamus* will not lie to compel the governor of a State to perform duties of a purely executive or political nature, involving the exercise of official judgment or discretion; but the decisions are wide apart as to the power of the courts to compel

him to discharge those duties which, as to other officials, are usually called ministerial. . . . We have no hesitation in holding that the courts have no jurisdiction to compel the governor to deliver to complainant the certificate claimed by him. No more have they the power to restrain him from issuing a certificate to the other applicant. If the governor can not be compelled by *mandamus* to deliver a certificate of election to one person, it follows that he can not be restrained by injunction from delivering it to another person, for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the courts in both instances. . . . Let us illustrate the connection, and at the same time the independence, of the three departments of the government: The legislature should never pass nor the governor approve an unconstitutional law. Yet, because the duty of enacting laws rests upon the one, and that of approving or disapproving them upon the other, the courts can not restrain the former from passing nor the latter from approving a statute obviously unconstitutional. While acting in their own appropriate spheres the legislature and the governor must be allowed to judge of the unconstitutionality of the law for themselves. After they have acted the judiciary may act, and, at the suit of some interested party, annul the law because violative of the Constitution. Thus the integrity and independence of each department are preserved, conflict between them is prevented, and the injurious operation of an unconstitutional law is averted."[1] 87, 322. *Bates v. Taylor.* 1889.

The Judicial Department.

Three Departments of Government a System of Checks and Balances—Delegation of Power by the Legislature—Acts Authorizing Courts to Grant Charters Void—Power to Establish Corporations.—The act under consideration was ch. 254, passed February 26, 1856, and conferring upon the Circuit courts the power to grant charters. McKINNEY, J.: "The multiplication of corporations of various kinds, in several of the American States, has long been regarded as a serious evil by many of our most enlightened statesmen and jurists. It has been attempted, in some of the States, to check their increase by constitutional restrictions. Such was the purpose of the provision in our amended Constitution, limiting the creations of corporations to such as might be deemed 'expedient for the public good.'[2] The rage for corporations is not easily to be checked. . . . The attempts to facilitate their multiplication by the act under consideration is alarming to every reflecting mind. A local

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[1] M. & V., 1094.

[2] The last clause of art. 11, sec. 7, of the Constitution of 1834, referred to in this opinion, is omitted from the Constitution of 1870, art. 11, sec. 8, which says that "the general assembly shall provide by general laws for the organization of corporations," etc. It follows, therefore, that this opinion is valuable only in so far as the discussion of the omitted clause is an essential part of the discussion pertaining to the powers of the respective departments of our State government.

tribunal is constituted in each county of the State, with full power to create corporations of every sort—municipal, public or private, ecclesiastical or lay, civil or eleemosynary—and for every possible purpose within the scope of the Constitution and general laws. No other restriction upon the powers to be granted is to be found in the act except the prohibition in respect to 'banking powers.'

"A remarkable feature of the act is that the persons seeking to be incorporated are at liberty to claim and prescribe for themselves, as a matter of right, whatever rights, powers and privileges they may choose to exercise. In this respect the court has no discretion. . . . The powers granted to different corporations, for the same general purposes, may be as diverse and conflicting as are the views and opinions of the different tribunals granting them. . . . And the corporate body so constituted is wholly irresponsible to the public or to individuals with whom it may have dealings, no security or indemnity being required by the act. Its charter is perpetual and irrevocable. It is subject to no supervision or control. . . . The act was designed, as is manifest from the purposes avowed in the bill as well as from the express terms of the first section, as an unqualified transfer of the exercise of the power to grant corporate privileges from the legislature to the courts; and probably was intended to exhaust the power of the legislature, in respect, at least, to all such corporations as are within the purview of the act. And the question is, Can the legislature divest itself of this power by a devolution of the power on the judicial department, or other substitute? . . . It is argued by the counsel for the defendants that this [1]proviso is not to be regarded as a substantive grant of power; that the power to grant corporate privileges is properly an original, inherent legislative function; and that the sole design of the proviso was to exclude the interpretation of the preceding prohibitory clauses as a denial of the power to the legislature to exercise this function in as ample manner as it before existed; that the effect of this proviso is to leave this power, and the mode of its exercise, to the discretion of the legislature as one of the powers incident to that department of the government, unrestricted by anything in the Constitution. And from this position the conclusion is deduced that it is competent to the legislature to delegate the exercise of this power to the courts, or any substitute it may be thought proper to select. If the effect of the proviso were that supposed in the argument, which we do not admit, the conclusion is by no means legitimate. . . . Here corporations are created only by statute. In this state they can not exist otherwise.

"In the theory of our government all sovereignty is inherent in the people; the Constitution of this State so expressly declares. . . .

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[1] Art. 11, sec. 8.

Each department is limited within its own appropriate sphere. To each has been delegated by the people, whose agents they are, such portion of sovereignty as was deemed expedient. On the one hand, neither can assume the exercise of any of the powers conferred upon either of the others; nor, on the other, can either divest itself by transfer to another department or other sub-agent, of any portion of the power expressly confided to its own exercise, except in virtue of an explicit authority to that effect given by the Constitution itself. It is obvious, then, that the construction of the proviso to the seventh section, contended for by the defendant's counsel, does not aid the argument in favor of the authority of the legislature to delegate to the courts the power of establishing corporations. For whether this power be viewed simply as the exercise of an ordinary function of legislation, upon which the Constitution has imposed no restriction, or as the exercise of a power derived by express grant from the Constitution; still, in either aspect, it is a power properly belonging to the legislative department, and being such, its exercise by either of the other departments is prohibited by the constitutional provision above cited. There can be no such thing, under the Constitution, as the devolution of power by one department upon another unless by special authority of the Constitution itself, and none such exists in reference to the power in question. The delegation of sovereign power is, in itself, an act of sovereignty, and can only be made by the constituent body in whom the original power resides, or by its express authority.

"It is true the legislative power is, in some respects, the 'sovereign power of the State.' Its constitutional powers are much more extensive, and less capable of being circumscribed within precise limits than those of either of the other departments; yet the Constitution has prescribed certain bounds which it can not transcend, and beyond these limits its acts are void. If the legislature might do what has been attempted by this act under consideration, that system of checks and balances introduced into our forms of government, both State and Federal, and founded on the distribution of powers between the several departments on which the safety of our free institutions has ever been found mainly to depend, might soon be destroyed. But we construe the proviso to be an abridgment of the power of incorporation. The power is conceded, but the purpose for which it may be exercised is also declared, namely, 'for the public good.' The legislature may not grant charters of incorporation *ad libitum* for any and every purpose, but only 'such charters' as may be 'expedient for the public good.' The power is not general. It is qualified and restricted by the specification of the purpose for which it may be exercised.

"We, therefore, hold that the act under consideration is inconsistent with the Constitution and void. First, because it attempts to vest the

judicial department with the exercise of a power which belongs exclusively to the legislature; and, in addition, it assumes to transfer what the legislature did not possess, unlimited power to grant charters of incorporation for all conceivable purposes at the will and pleasure of the applicants, wholly irrespective of the 'public good,' and even contrary thereto. And, secondly, because the legislature itself is but an agent of the people. Its entire authority is merely a delegation of power from the constituent body—the people; its members are the chosen and confidential depositories of the law-making power of the government; to whom, in the most emphatic sense, are confided personally the most important and sacred governmental trusts—trusts which, in their very nature and intention, must be exercised in person, the idea of a transfer or delegation thereof being in direct opposition to the design and ends of their creation." **35**, 650. [1]*The State v. Armstrong.* 1856.

Law-making Power — Transfer to Judicial Department. — HAWKINS, J.: "We have repeatedly holden, that the Act of Congress, declaring United States treasury notes a legal tender in the payment of debts, was valid and binding. The correctness of these decisions has not been questioned in argument, but it is insisted, that, inasmuch as the question had not been judicially determined in this State prior to January 14, 1864, the date of the tender in this case, therefore, an offer to pay in these notes, did not constitute a valid tender. This proposition certainly can not be maintained; so to hold, would be, in effect, to transfer the law-making power from the legislative to the judicial department of the government. To hold that acts of the legislature, State or national, are inoperative until sanctioned or promulgated by the courts, would, in our opinion, be monstrous." **44**, 614. *Johnson v. Taylor et al.* 1867.

Duty of Supreme Court to Declare Act Unconstitutional. —FREEMAN, J.: "It has been earnestly pressed on us that, as a co-ordinate department of the government, we should approach with great tenderness a conclusion that the legislature had violated the Constitution by any of its enactments. On this question we may make one remark, that whatever is constitutionally enacted by the legislature, is binding upon us as a court, and we shall firmly and fairly enforce it as the law of the land. Yet we shall with equal firmness, and without any feeling of hesitancy on our part, declare any enactment a nullity, and binding on no one, that violates either the Constitution of the United States or of our own State. This high duty is imposed on us by the position which we occupy, and we shall not at any time shrink from its performance, or hesitate for a moment in announcing our decisions upon such questions. We know

[1] See same case, art. 11, sec. 9.

that in these Constitutions are embodied the guaranties for life, liberty and property, won from power in all ages past by brave and true men —patriots and lovers of freedom—and if sternly and truly enforced by an enlightened and fearless judiciary, the liberties of our people are safe from all things but the strong hand of military power or despotism, backed and sustained by such power. Against power thus supported, the judiciary is powerless; but when such power shall grow formidable enough in a republic to be put in motion against the liberties of the people, the days of constitutional freedom will already have been numbered, and an independent judiciary be unknown—a Constitution, with its limitations upon power, be but a name, a shadow, the substance and reality having passed away." **50**, 704. [1]*Pope v. Phifer et al.* 1871.

Act Requiring Venue to be Changed on Affidavits of Union Men.—NICHOLSON, J., held: "The Act of 1867, ch. 36, sec. 8, requiring in cases where the venue had been changed, that it should be charged back on certain affidavits of unconditional Union men was unconstitutional, saying: 'It is clear that the whole purpose of the act was to reverse and supersede the orders made in pursuance of existing laws as to ascertain cases then pending. It was not simply a special act, for the benefit of a few, and not applicable to all suitors alike, and, therefore, in violation of art. 1, sec. 8, of the Constitution; but it was an indirect assumption of judicial powers, in violation of art. 2, sec. 1, of the same instrument." **51**, 357. *Brown v. Haywood.* 1871.

When State and Federal Constitutions Conflict.—NICHOLSON, J.: "There can be no debate at this day as to the proposition that a convention of a people of a State, in making or amending their fundamental law, is restricted in its powers only by the limitations of the Federal Constitution. We yield a ready assent also to the proposition, that the judicial department will not declare an act of the legislative department unconstitutional, unless its violation either of the Federal or State Constitution is clear and free from doubt. And we hold it an equally sound doctrine, that when the judicial department is called upon to determine whether a convention of the State has introduced into its Constitution a clause in violation of the Constitution of the United States, the paramount duty of sustaining the Federal Constitution should require it to be clearly made out, that the State Constitution is in harmony with the Federal Constitution." **52**, 358. [2]*Yancy v. Yancy.* 1877.

Acts, Judicial and Legislative in Character—Difficult to Distinguish—Rule—Suits Pending in Courts—Act Giving Remedies Not Before Possessed—Severance in Trial—Act of 1871, Ch. 126, p. 136, Partly Unconstitutional.—NICHOLSON, J.: "It is essential to the maintenance of republican government, that the action of the legislative, judicial,

[1] See same case, art. 7, sec. 2.

[2] See same case, schedule, sec. 4.

and executive departments should be kept separate and distinct, as it is expressly declared it shall be by the Constitution. The most responsible duty devolving upon this court is to see that this injunction of the Constitution shall be faithfully observed. We have no right to go outside of statutes presented for our examination and adjudication, to look into the motives for their enactment. We are to confine ourselves to the provisions of the statute itself, and in our decisions we are to presume that the legislature not only acted upon consideration of public good, but that they have acted within the sphere of their legitimate powers. Conceding all this, we are bound, on the other hand, whenever in our deliberate judgment these legitimate powers have been transcended, to interpose for the protection and preservation of the Constitution. It was said by Chief Justice Marshall, in Hyman Southard, 10 Wheat., 46, that 'the difference between the departments, undoubtedly is, that the legislative makes, the executive executes, and the judiciary construes the law.' To adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to construe and apply the terms, is the peculiar province of the judicial department. It is not always an easy task to determine whether an act of the legislature is judicial or legislative in its character. Perhaps it may be correctly said, that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions. Const. Law, 91; Bates *v.* Kimbald, 2 Chip., 77. According to this definition, it is clear that the act in question, so far as it is intended to operate prospectively, is a legislative act. But as to that portion of it which relates to suits pending when it was passed, it is not so clear, whether it is legislative or judicial.

"The act in question is legislative in form, but it operates expressly on suits pending in courts. It not only gives to defendants in such suits defensive remedies which they did not have before, but it prescribes the character of proceedings to be taken in court by defendants to avail themselves of their new defensive rights. To obtain a severance — a new right conferred — they are to make a motion in court — this motion must be acted on by the judge and a record made, that upon motion of defendant, he is entitled to a severance and a separate trial, the judge makes the order nominally, but as he has no discretion and he acts under the order of the legislature — it is, therefore, to all intents and purposes, the act of the legislature. Again, after having secured a severance by the process of motion and judgment of severance, the act then authorizes him to file his petition, stating that he is a citizen of Davidson county, and after swearing to it, he is entitled to have the same removed to Davidson county — and the act says, 'the removal

shall be ordered.' Of course this can only be done by a judgment of the court—it is upon such judgment of severance and of removal that the Circuit court of Davidson is to take jurisdiction. But in such judgment, it is not the judgment of the presiding judge—he is allowed no discretion whether the severance or the removal is to be allowed—he is commanded to give the judgments, and the exact judgments to be given are prescribed by the legislature. We are of opinion that these are judicial acts of the legislature. . . . Upon both grounds, therefore, first, because the act in question does not furnish plaintiff with a remedy substantially the same with that which was in force when the suit was commenced; and second, because the act as it relates to pending suits is judicial in its provisions, we hold that it is unauthorized by the Constitution, except as to its prospective provisions." TURNEY, J., dissented. 58, 689. *Mabry v. Baxter.* 1872.

Rights of Parties—Distinctive Duties of Legislature and Courts in Regard to Same—Administrators and Executors—Evidence.—T. & S. Code, sec. 3813, reads as follows: "In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." FREEMAN, J.: "It is evident that under this last clause it was intended by the legislature to give the court the power to call the party, or require of him to testify, and that unless so required he should be incompetent under the previous part of the section quoted. Can this be sustained as a law of the land, or does it not confer on our courts legislative and not judicial power? We have given some consideration to this question, and we are compelled to hold the latter to be the result. The rule of law, the general rule which is the law of the land, applicable to all the parties named, is, that they are incompetent. Such would be the rule to be enforced by the court on objection made to such a witness, and by which he could be adjudged incompetent under the law to testify. This, then, would be the rule of law; but under this last clause the court might say, the law renders you as a party incompetent, and you can not be permitted to sustain your right as claimed by your own testimony; it must, therefore fail. But I think this is a proper case where you may be required to testify, and the court has the right to relieve from the disability imposed by the law; you can, therefore, be a witness, because the court thinks it a proper case to allow this to be done.

"This is to leave the rights of parties dependent on the will of the judge, with no rule prescribed by which he is to be guided in his action, nothing by which the party can say it is his right to be heard. In a word, in the place of a rule of action prescribed being made the test of

the right of the party, the court makes the rule and enforces it, or refuses to make it, as he chooses, thus performing a legislative act, that is, giving the law to the party in the particular case, not deciding upon what the law is. The practical result is, or may be, that a debt may be recovered, as in this case, if the court chooses to allow the party to prove it; but if not, the right claimed can not be maintained. This would leave no rule for the action of all the courts of the State by which to be guided, nor the same court in every case, but would make the law on which the rights of the parties depend as variable as the judgment, whim or caprice, or even the prejudice of the judge might dictate. This is not to adjudge what the law is, but to make it, a power which can not be conferred by the legislature upon the judiciary. It belongs to the law-making department to say what shall be the rule by which the rights of parties are to be settled. It is the judicial function to ascertain what that rule is and enforce it, or apply it to the decision of questions presented. No rule is prescribed in this statute except the will of the judge." **68**, 429. *Tillman v. Cocke.* 1877.

Duty of the Court in Construing Statutes—McFARLAND, J.: "The duty of the court to pass upon the constitutionality of legislative acts is a very grave and responsible one. Every presumption should be made in favor of the validity of the laws. The members of the legislature in enacting laws must of necessity judge of their constitutionality in the first instance, and the opinion of that body, which is not conclusive upon the court, is yet entitled to the respectful consideration due from one department of the government to another, and while the Constitution is the supreme law, and the courts should not, out of any mere feeling of deference to the legislature, hesitate to maintain its supremacy, yet legislative acts should not be subjected to a hypercritical test. If subject to two reasonable constructions, they should be construed so as to give them effect rather than to defeat them. They should not be declared void unless they appear to be manifestly so according to the plain letter and spirit of the Constitution." **71**, 81. [1]*The State ex rel. Morrell et al. v. Fickle Chairman.* 1879.

Custody of Jury Pending Trial—Discretion of Judge.—TURNEY, J., held: [2]"Act of 1887, ch. 158, providing that, in a certain class of criminal trials, 'it shall not be necessary for the presiding judge to place the jury in charge of an officer, *but the jury may, in the discretion of the court, disperse, as in other cases,*' is unconstitutional, because it substitutes the judge's *uncontrolled discretion* for the *rule of law*, and thereby confers upon him legislative power." **87**, 304. *King v. The State.* 1889.

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[1] See same case, art. 2, sec. 17.

[2] See M. & V., 6047.

THE LEGISLATIVE DEPARTMENT.

ART. 2, SEC. 3. The legislative authority of this State shall be vested in the general assembly, which shall consist of a senate and house of representatives, both dependent on the people [Same as Const. 1834, art. 2, sec. 3; Const. 1796, art. 1, sec. 1.] who shall hold their offices for two years from the day of the general election. [As provided in Const. 1834, art. 2, sec. 7, and Const. 1796, art. 1, sec. 5 post.]

ART. 2, SEC. 4. An enumeration of the qualified voters and an apportionment of the representatives in the general assembly shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years. [Const. 1834, art. 2, sec. 4, was same except as to date of first enumeration, which in that instrument was 1841.]

ART. 2, SEC. 5. The number of representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed seventy-five until the population of the State shall be one million and a half, and shall never exceed ninety-nine; provided, that any county having two-thirds of the ratio shall be entitled to one member. [Same as Const. 1834, art. 2, sec. 5.]

[Const. 1796, art. 1, sec. 2. "Within three years after the meeting of the general assembly, and within every subsequent term of seven years an enumeration of the taxable inhabitants shall be made in such manner as shall be directed by law. The number of representatives shall at the several periods of making such enumeration be fixed by the legislature, and apportioned among the several counties according to the number of taxable inhabitants in each, and shall never be less than twenty-two nor greater than twenty-six until the number of taxable inhabitants shall be forty thousand; and, after that event at such ratio that the whole number of representatives shall never exceed forty."]

ART. 2, SEC. 6. The number of senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the senators among the different counties the fraction that may be lost by any county or counties in the apportionment of members to the house of representatives shall be made up to such county or counties in the senate as near as may be practicable. When a district is composed of two or more counties they shall be adjoining, and no county shall be divided in forming a district. [Same as Const. 1834, art. 2, sec. 6.]

[Const. 1796, art. 1, sec. 3. "The number of senators shall, at the several periods of making the enumeration before mentioned, be fixed by the legislature, and apportioned among the districts formed as hereinafter directed according to the number of taxable inhabitants in each, and shall never be less than one-third or more than one-half of the number of representatives."]

[Const. 1796, art. 1, sec. 4. "The senators shall be chosen by districts to be formed by the legislature, each district containing such a number of taxable inhabitants as shall be entitled to elect not more than three senators. When a district shall be composed of two or more counties they shall be adjoining, and no counties shall be divided in forming a district."]

ART. 2, SEC. 7. The first election for senators and representatives shall be held on the second Tuesday in November, one thousand eight hundred and seventy; and forever thereafter elections for members of the general assembly shall be held once in two years on the first Tuesday after the first Monday in November. Said elections shall terminate the same day.

[Const. 1834, Art. 2, Sec. 7. "The first election for senators and representatives shall be held on the first Thursday in August, one thousand eight hun-

dred and thirty-five; and forever thereafter elections for members of the general assembly shall be held once in two years, on the first Thursday in August, which said elections shall terminate the same day."]

[Const. 1796, Art. 1, Sec. 5. "The first election for senators and representatives shall commence on the second Thursday in March next, and shall continue for that and the succeeding day; and the next election shall commence on the first Thursday in August, one thousand seven hundred and ninety-seven, and shall continue on that and the succeeding day; and forever after elections shall be held once in two years, commencing on the first Thursday in August and terminating the succeeding day."]

ART. 2, SEC. 8. The first session of the general assembly shall commence on the first Monday in October, 1871, at which time the term of service of the members shall commence and expire on the first Tuesday in November, 1872, at which session the governor elected on the second Tuesday in November, 1870, shall be inaugurated; and forever thereafter the general assembly shall meet on the first Monday in January next ensuing the election, at which session thereof the governor shall be inaugurated.

[Const. 1834, Art. 2, Sec. 8. "The first session of the general assembly shall commence on the first Monday in October, one thousand eight hundred and thirty-five; and forever thereafter the general assembly shall meet on the first Monday in October next ensuing the election."]

[Const. 1796, Art. 1, Sec. 6. "The first section of the general assembly shall commence on the last Monday of March next, the second on the third Monday of September, one thousand seven hundred and ninety-seven; and forever after the general assembly shall meet on the third Monday of September next ensuing the then election, and at no other period, unless as provided for by this Constitution."]

ART. 2, SEC. 9. No person shall be a representative unless he shall be a citizen of the United States of the age of twenty-one years, and shall have been a citizen of this State for three years, and a resident in the county he represents one year immediately preceding the election. [Same as Const. 1834, art. 2, sec. 9.]

[Const. 1796, Art. 1, Sec. 7. "That no person shall be eligible to a seat in the general assembly unless he shall have resided three years in the State and one year in the county immediately preceding the election, and shall possess in his own right in the county which he represents not less than two hundred acres of land, and shall have attained the age of twenty-one years."]

ART. 2, SEC. 10. No person shall be a senator unless he shall be a citizen of the United States of the age of thirty years, and shall have resided three years in this State and one year in the county or district immediately preceding the election. No senator or representative shall, during the time for which he was elected, be eligible to any office or place of trust the appointment to which is vested in the executive or general assembly, except to the office of trustee of a literary institution. [Same as Const. 1834, art. 2, sec. 10.]

[Const. 1796, Art. 1, Sec. 24. "No member of the general assembly shall be eligible to any office or place of trust except the office of justice of the peace or trustee of any literary institution, when the power of appointment to such office or place of trust is vested in their own body."]

ART. 2, SEC. 11. The senate and house of representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and elections of its members, and sit upon its own adjournments from day to day. Not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized by law to compel the attendance of absent members. [Same as Const. 1834, art. 2, sec. 11. Const. 1796, art. 1, sec. 8, was the same, except that it provided that "two-thirds of each (house) shall constitute a quorum."]

ART. 2, SEC. 12. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the legislature of a free State. [Same as Const, 1834, art. 2, sec. 12; Const. 1796, art. 1, sec. 9.]

ART. 2, SEC. 13. Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the session of the general assembly, and in going to or returning from the same; and for any speech or debate in either house they shall not be questioned in any other place. [Same as Const. 1834, art 2, sec. 13; Const., 1796, art. 1, sec. 10.]

ART. 2, SEC. 14. Each house may punish by imprisonment, during its session, any person not a member, who shall be guilty of disrespect to the house by any disorderly or any contemptuous behavior in its presence. [Same as Const. 1834, art. 2, sec. 14; Const. 1796, art. 1, sec. 11.]

ART. 2, SEC. 15. When vacancies happen in either house the governor for the time being shall issue writs of election to fill such vacancies. [Same as Const. 1834, art. 2, sec. 15; Const. 1796, art. 1, sec. 12.]

ART. 2, SEC. 16. Neither house shall, during its session, adjourn without the consent of the other for more than three days, nor to any other place than that in which the two houses shall be sitting. [Same as Const. 1334, art. 2, sec. 16; Const. 1796, art. 1, sec. 13.]

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ART. 2, SEC. 17. (Bills may originate in either house, but may be amended, altered, or rejected by the other.) No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive, or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended.[1]

[Const. 1834, art. 2, sec. 17, and Const. 1796, art. 1, sec. 14, contained only the clause in parenthesis.]

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[1] For indirect or unimportant reference to this section, see Third Tenn. Chc'y Rep., 612; **22**, 18; **62**, 147; **71**, 57, 558; **74**, 221; **78**, 484; **80**, 397; **81**, 726; **84**, 122, 407; **89**, 542; **91**, 421, 511; **92**, 607; **93**, 571, 678; **94**, 692.

The office of register of the mountain district continues to exist. See **80**, 401, construing M. & V., 513 et seq.

Repeals by Implication.

Meaning of Purview—Intention to Repeal Never Presumed—Inconsistent Acts.—OVERTON, J.: "It is admitted that the Act of 1789 expressly repeals the ninth section of the Act of 1715. The repealing clause is relied on, which is in these words: 'That all laws and parts of laws, that come within the purview and meaning of this act, are hereby declared void and of no effect.' There are two ways of repealing acts, one by implication and the other by express words. It is believed by the court that the Act of 1789 can not be considered as an express repeal. It is not pretended that it repeals the ninth section in direct language, but that the expression 'all laws and parts of laws coming within the purview and meaning,' repeals it. How would this repealing clause stand without the word purview? Simply thus: That all such parts of its provisions as came within the meaning of the Act of 1789 should be repealed. Now, it can not be perceived that the addition of the word purview makes any difference in the meaning of the legislature. Lord Coke informs us that the purview is all that part of an act which lies between the caption and the repealing clause. Thus, it seems, that it means nothing more than the body of the act. But what is the meaning of the body or purview of the act? recurs upon us. And turn this repealing clause as you may, the same point presents itself. All such parts of former acts as were within the purview or body of this act are repealed. The word purview, in this place, is a mere expletive. Either that, or the word meaning, must be useless. And at last, the intention of the legislature must be collected as if there were no such repealing clause. It does not say the ninth section must be repealed; and whether it is or not, must be ascertained in the same manner as if this repealing clause was not here. It is very common for the legislature to say, at the end of its acts, that 'all such parts of former acts as come within the purview of this act shall be repealed.' How are courts to ascertain what comes within the meaning of an act, but by applying the common rules of construction, which are nothing but the dictates of common sense? It is certainly incorrect to suppose that a subsequent statute, of course, repeals a previous one on the same subject. A disposition entirely adverse to this proposition is always entertained by the expounders of the law. A legislative intention to repeal is never presumed, nor are implied repeals encouraged. The provisions of a subsequent act must be inconsistent with those of a prior statute, else it can not be said that the legislature intended a repeal. If the provisions of a subsequent statute are commensurate with the evils redressed by the former, it operates as an entire repeal; otherwise, it is a repeal *pro tanto*. In this view of the subject, it is essential that not only every part of the same act should be taken into consideration, but all statutes made on the same subject, in order that it may be seen how

far one statute repeals another, as well as to ascertain the meaning of the legislature, by comparing different parts of the same and other acts on the subject together. Lord Coke, in 11 Rep., 63, 64, lays down the rule to be, 'that if a subsequent act can be reconciled with a former one, it shall not be a repeal.' Further information respecting the construction of statutes may be collected from a variety of books with which the practitioners in this court must be conversant." 3, 338. *Smith v. Hickman's Heirs.* 1813.

When Statute is Repealed by Implication.—REESE, J.: "Statutes are repealed or changed, in whole or in part, by subsequent statutes, when the latter referring to them in terms declares the repeal or change, and the extent of it; or, when the provisions of the subsequent statutes, in their operation and effect, are inconsistent with, or repugnant to, the unchanged or unmodified operation and effect of such former statutes. In this latter case such former statutes are repealed, or changed or modified by the necessary implication of an express intention on the part of the legislature to compass that end, to the extent, and in those particulars only, in which such inconsistencies or repugnancy exist; and this, even without any reference to such former statutes, or any express declaration to that purpose." 23, 72. *Browning v. Jones.* 1843.

Jurisdiction of Justices—Replevin.—WRIGHT, J.: "This is a suit by warrant in replevin before a justice of the peace, issued the 10th of October, 1856. And the only question is, whether the justice had jurisdiction? And we think he had. By the Act of 1846, ch. 65, the Circuit courts alone had jurisdiction of all suits in replevin, however trivial the cause of action. This defect was soon perceived by the legislature, and remedied by the [1]Act of 1851, ch. 32, and jurisdiction conferred on justices of the peace in actions of replevin where the amount did not exceed $50. This act is not repealed by the Act of 1854, ch. 60, and the jurisdiction of the justice of the peace remains undisturbed. The only object of this last mentioned act was to so amend the Act of 1846 as to authorize the action of replevin to be instituted in the courts of the county in which the goods and chattels sued for 'may be found.' It had reference only to the Circuit courts, and the jurisdiction of justices of the peace was not in the least affected by it. The Acts of 1851 and 1854 may well stand together, and implied repeals are not to be encouraged. 2 Meigs Dig., 972-3; Cate *v.* The State." 38, 114. *Hockaday v. Wilson.* 1858.

Powers of Municipal Corporation—Repeal of by Implication—Subsequent Legislation.—NICHOLSON, J.: "The repeal, or revocation, or modification of the powers of a municipal corporation may be effected,

[1] T. & S., 3375 et seq.; M. & V., 4111 et seq.

either expressly or by necessary implication, by subsequent legislation. Hence, if the Act of 28th February, 1870, incorporating the Memphis Water Company with exclusive powers to erect waterworks in Memphis, and supply the city and its inhabitants with water, was a valid and constitutional exercise of legislative power, it operated, by necessary implication, as a revocation of the power of the city corporation to erect waterworks for the same purposes." **52**, 528. [1]*City of Memphis v. Memphis Water Co.* 1871.

More About the Objects of this Provision—Does Not Apply to Repeals by Implication—Reasons—Authorities Discussed.—The Act of 1875, ch. 109, provided for the payment to the State of a prescribed tax by foreign insurance companies for the privilege of doing business in this State, "which shall be in lieu of all other taxes." By the Act of 1879, ch. 84, sec. 7, sub-sec. 53, an additional tax for the benefit of the taxing district was laid on the same business. COOPER, J.: "The argument on behalf of the companies is that the Act of 1879, to be operative in the levying of additional taxes on them, must be held to repeal the words, 'which shall be in lieu of all other taxes' of the Act of 1875, and is to that extent, unconstitutional, because it neither recites in its caption or otherwise the title or substance of the law repealed. The words relied on, as we have seen, do not amount to a contract, nor limit the power of subsequent legislatures. They should be read as if the clause was written thus: 'Which shall be in lieu of all other taxes until the legislature imposes other taxes.' For that is what in legal effect they mean. In this view, nothing was repealed by the subsequent legislation, the clause in controversy being mere surplusage and both acts remaining in full force. If this construction be inadmissible, the second act is incompatible with the first, and does repeal it by necessary implication. The question in this view is squarely raised, whether implied repeals are within the purview of the constitutional provision. It has not, heretofore, been deliberately considered and determined by the court, although there have been expressions of opinion on the point in cases in which its decision was, perhaps, not absolutely demanded. The State ex rel. *v.* Gaines, McGee *v.* The State, The State ex rel. *v.* McConnell. The present case, although not absolutely requiring its solution, has been selected in connection with another case in which the question is directly raised, for its discussion and determination.

"Strictly speaking, a new statute does not repeal an old statute, however inconsistent with it. It is a mere form of expressing the result to say that the one repeals the other by implication. The prior act is not repealed, but rendered inoperative. And this is made plain by the fact that a direct repeal of the latter act, without any reference to the

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[1] See same case, art. 1, sec. 20, p. 185; art. 1, sec. 22, p. 229; art. 11, sec. 8.

former, will, by a rule of the common law, give efficacy to the former. It was precisely because the old act never was repealed that it thereby became operative. It is a convenient, though inaccurate use of language to say that the new law repeals the old, and that the repeal of the new law revives the old. More properly the new act is an obstacle to the operation of the old act, which obstacle is removed by its repeal. It may well be doubted, therefore, whether a repeal by implication falls within the letter of the Constitution. It has usually been considered as if it did. The question, in this view, is not one altogether of first impression. Several of the State Constitutions contain similar provisions; that is, provisions designed for the same purpose, some of them couched in stronger language. A common provision in many of these Constitutions is thus worded: 'No act shall ever be revived or amended by mere reference to its title, but the act revived or section amended shall be set forth or published at full length.' Cooley Const. Lim., p. 151, n. 1. 'It has been uniformly held,' says Judge Cooley, 'that statutes which amend others by implication are not within these constitutional provisions, and that it is not necessary that they even refer to the acts or sections which by implication they amend.' He cites Spencer *v.* The State, 5 Ind., 41; Branham *v.* Lang, 16 Ind., 481; People *v.* Mahoney, 13 Mich., 581; Lehman *v.* McBride, 15 Ohio, N. S., 593.

"This conclusion has been reached partly from a consideration of the purpose for which the constitutional provision was adopted, and partly from the argument *ab inconvenienti* that a contrary decision would render legislation well nigh impossible. The first of these reasons, every judge knows, is one which uniformly influences the judicial construction of statutes, where the meaning is at all doubtful. The evil intended to be remedied is a most potent factor in ascertaining the legislative will. It should have even greater weight in construing the work of a constitutional convention. For the language of a Constitution must necessarily be very general, admitting often of a broader sense than was meant to be conveyed. Error in the former case is, moreover, much less injurious and more easily corrected than the latter. And in either case, whenever the statute or constitutional provision undertakes to limit the power of the political department, every intendment should be in favor of that department. A doubt, as has often been said by the courts in relation to the great prerogative of legislation, should inure to the benefit of the government. The evil which led to the adoption of the constitutional provisions under consideration was, undoubtedly, the passing of laws without the members of the legislature being fully advised of what they were doing. 'The mischief designed to be remedied,' says Judge Cooley, 'was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty of making

the necessary examination and comparison, failed to become apprised of the change made in the laws.' People *v.* Mahoney, 13 Mich., 455. The same is equally true of repealing statutes which fail to call the attention of the legislature to the substance of the act repealed. The evil, it will be noticed, only applies to statutes which purport to repeal, revive or amend. No such evil can follow direct and positive legislation, which, precisely because it is positive, repeals by implication previous legislation. For, in such case, the legislature of course know what they propose to pass into a law, and intend that it shall be the law, whatever may have been previously enacted. 'The very fact,' says the Supreme court of Maryland, 'of establishing a particular rule of conduct for the public presupposes an intention on the part of the legislature that a contrary rule to that which previously existed should prevail, and therefore the enactment of one law is as much a repeal of all inconsistent laws as if the inconsistent laws had been repealed by express words.' 7 Md., 151, 159. Not the least possible danger can arise from a repeal by implication. For such a repeal is not favored nor admissible unless the positive provisions of the new law are utterly irreconcilable with the old law, thus unmistakably showing to the satisfaction of the judiciary that the repeal was intended.

"On the other hand, the evils of a different construction of the constitutional provision are obvious and striking. It would result in turning what was intended to prevent unadvised legislation into a barrier to all legislation, and a certain snare to the legislator. 'It would render,' says the Supreme court of Maryland, 'many wholesome laws wholly inoperative because of the inability or neglect of members to search thoroughly the statute books for laws which might be inconsistent or repugnant, a work of so great difficulty as to amount almost to an impossibility.' 7 Md., 159. The difficulty of determining the effect of a new statute of a general nature on the pre-existing system is notoriously great. Time alone, and the practical application of the new law to the varying phases of actual cases can show the ultimate results. To require from our legislators in advance what the wisest lawyer or judge would find a hopeless task upon serious study, would indeed go far to render legislation impossible. Nor would this be the greatest evil. It would often happen, after a new statute had been acted on and treated as valid for years, that some old statutory provision would be discovered which would annul it *ab initio*. That the constitutional provision under consideration does not apply to repeals by implication seems to be sustained by reason, as it certainly is by [1]authority." FREEMAN, J., dissented. **72**, 647. *Home Insurance Co. v. Taxing District.* 1880.

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[1] See **72**, 353.

Assessment Law of 1881—Municipal Taxes in Body of Act—No Reference to Same in Title—Comments on Doctrine of Implied Repeals.—FREEMAN, J., held in this case that the Act of the General Assembly, 1881, entitled "An Act to provide more just and equitable laws for the assessment and collection of revenue for State and county purposes, and to repeal all laws now in force whereby revenue is collected for the assessment of real estate, personal property, privileges and polls," was void, because it provided for the collection of municipal taxes in the body of the act, while no reference was made to same in title. . . . In delivering this opinion he said: "The doctrine of implied repeal under this section, after much contest, has been established as the view of the majority of this court, and to that the writer of this opinion yields obedience. It stands on the ground that where there is an affirmative enactment laying down definitely the new rule that the evil of want of notice of the law repealed by the legislature and the public does not arise, and therefore a liberal construction of the clause may be permitted, and the implied repeal held not forbidden by the Constitution. But while we have adopted a most liberal construction of the clause of the Constitution (one that the writer of this opinion thinks went beyond the intent and meaning of the language used), yet we have always felt bound to hold that the article did fix limits upon legislative action, and when these limits were passed, it is an imperative duty to declare the act unconstitutional and a nullity." COOPER, J., dissented. 80, 180. *Mayor etc. of Knoxville v. Lewis.* 1883.

Jurisdiction of County Court—Implied Repeals Not Favored.—FREEMAN, J.: "While it is now the settled doctrine of this court that implied repeals are constitutional, still they are not favored, and where the conflict between a later statute and a former one is not clear, and a necessary implication, such repeal will not be held. After careful consideration we do not think the Act of 1881, section 4, repeals section[1] 1620 of the Code. The jurisdiction of the county court may well remain, and both statutes have full effect." 81, 675. *Willaford v. Pickle.* 1884.

Municipal Corporations—Act Authorizing Them to Levy Tax for School Purposes.—COOPER, J.: "The legislature, by the Act of 1872, ch. 12, authorized all municipal corporations to establish a system of public schools and levy a tax in support thereof, upon the consent of a two-thirds of the qualified voters of the municipality given at an election held for the purpose. It is now insisted that the amendatory [2]Act of 1885 repeals the Act of 1872 by "necessary implication," and is, therefore, void, because it violates the Constitution by failing to refer to the

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[1] Acts 1881, ch. 38, sec. 4, M. & V., 2127.

[2] Act 1885, ch. 37; M. & V., 1652, 1657; Shan. Sup. to M. & V., p. 139.

act repealed. But if the fact were as claimed, we have settled that the section of the Constitution referred to has no application to statutes which repeal by implication." **83**, 639. [1]*Ballentine v. Mayor etc. of Pulaski.* 1885.

Carrying Weapons—Journey Feature—Repeal—Justices of the Peace—Jurisdiction of.—FOLKES, J., held: "Since the Act of 1879, ch. 186, no person can lawfully carry any of the weapons therein prohibited, while on a journey out of his county or the State. That act repeals the journey feature of the former laws on the subject of carrying arms. . . . A statute inconsistent with, and embracing the entire subject matter of, a former statute repeals it, either with or without a repealing clause. . . . A statute which operates to repeal a former statute, by implication merely, does not fall within this section." He said also: "We have practically held at the present term, in the case of Foust *v.* The State, that the [2]Act of 1879, now under consideration, has repealed by implication the acts giving justices of the peace jurisdiction over concealed weapon cases under the 'small offense' laws." **85**, 495. *Poe v. The State.* 1886.

Subject and Title.

This Section an Unconditional Limitation Upon Legislative Power—Not Directory—Object of the Convention in Adopting It—Rule of Construction.—NICHOLSON, J.: "The particular portion of this section on which the question, in the present case, is raised, is the following: "No bill shall become a law which embraces more than one subject; that subject to be expressed in the title. Similar provisions have been introduced, of late years, into many of the State Constitutions, and frequent occasions have arisen for their construction by the courts. In several States the courts have construed the provisions to be only directory to the legislatures, and held that their acts are not invalid, although not conforming to the directory requirements of their Constitution. But the courts of most of the States have construed the provisions to be mandatory or imperative, and, therefore, that the acts not passed in conformity therewith, are invalid and void. The language adopted in our Constitution differs, in some respects, from that used in other States. 'No bill shall become a law which embraces more than one subject.' This is a direct, positive and imperative limitation upon the power of the legislature. It matters not that a bill has passed through three readings in each house, on three different days, and has received the approval of the Governor; still it is not a law of the State if it embraces more than one subject. It is, therefore, a plain, absolute

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[1] See same case, art. 1, sec. 8, p. 62; art. 2, sec. 2, p. 252; art. 2, sec. 28; art. 2, sec. 29; art. 11, sec. 8; art. 11, sec. 12.

[2] M. & V., 5533; T. & S., 4759a; **85**, 343.

and unconditional limitation upon legislative power. But while it is conceded that a bill which embraces more subjects than one can not become a law, because of the imperative or mandatory character of the language, yet it is suggested that the remaining portion of the provision, to wit: 'that subject to be expressed in the title,' was not intended to be mandatory, but only directory; and, therefore, that a bill may become a law, although the subject of the bill may not be expressed in the title.

"In the present case we do not deem it necessary to express an opinion as to the question, whether any provision of a Constitution can be properly treated otherwise than as mandatory. The essential nature and object of constitutional law being restrictive upon the powers of the several departments of government, it is difficult to comprehend how its provisions can be regarded as merely directory. But, however this may be as to other provisions of the Constitution, we can see no reason for placing a different construction on the language used in the latter portion of the provision under consideration from that placed on the first portion. The language, 'that subject to be expressed in the title,' can not merely be regarded as directory. The command is positive that no law shall embrace more than one subject, and is equally positive that that subject is to be, or shall be expressed in the title. To constitute a valid law under this provision, the bill must not embrace one subject alone, but that subject must be embraced in the title.

"Plausible reasons might be given to show that it was not essential to the object which the Convention sought to accomplish that the subject of legislation should be imperatively indicated in the titles of bills, but where there is no real ambiguity in the language employed, we have no right to fritter away the obvious import of that language by construction. The convention evidently designed to cut up by the roots not only the pernicious system of legislation, which embraced in one act incongruous and independent subjects, but also the evil practice of giving titles to acts which conveyed no real information as to the objects embraced in its provisions. To accomplish both purposes the convention deemed it wise to withhold from the legislature any power to enact a law which either embraced more than one subject, or which failed to express the fact in its title. . . . The true rule of the construction, as fully established by the authorities, is, that any provision of the act, directly or indirectly relating to the subject expressed in the title, and having a natural connection thereto, and not foreign thereto, should be held to be embraced in it." **55**, 517. *Cannon v. Mathes.* 1872.

Evils Intended to be Remedied by this Section—Rules of Construction.—McFARLAND, J.: "The evil intended to be remedied was to prevent laws upon one subject being tacked on to a bill upon a wholly different subject, and in this way sometimes elude the attention of the

legislature, and pass without sufficient consideration, and when passed often remain for some time undiscovered, by reason that the title of the act fails to call attention to it. This provision of the Constitution is a salutary one, and should be rigidly enforced according to its true spirit and intent, but not so as to embarrass the necessary legislation. Legislation upon different subjects, and upon subjects not indicated in the title of the act, are forbidden, but it was not intended that every provision or feature of the law should constitute a different subject so as to make it necessary to pass separate acts in regard to each; nor was it intended that the title should express fully everything contained in the act." 68, 586. [1] *The State v. Lassater.* 1877.

Act to Repeal Charters of Municipal Corporations — Provision Touching Property — General Rules of Construction. — COOPER, J.: "The decision of this case turns upon the constitutionality of the act of the legislature repealing the charter of the city of Memphis (1879, ch. 10), the Act to establish taxing districts (1879, ch. 11), and the act amendatory thereof (1879, ch. 84.) The first objection urged against them is, that they violate the following prohibition of the Constitution: 'No bill shall become a law which embraces more than one subject, that subject to be expressed in the title.' The objection is, that each of the first two acts embraces more than one subject. The title of chapter 10 is: 'An Act to repeal the charter of certain municipal corporations, and to remand the territory and inhabitants thereof to the government of the State.' The objection seems to be that while the subject of the title and of the act is the repeal of certain municipal charters, the fourth section of the act provides that the public buildings, squares, etc., 'and all other property, real and personal, hitherto used by such corporations for municipal purposes, are hereby transferred to the custody and control of the State, to remain public property as it has always been, for the uses to which said property has been hitherto applied.' The title of chapter 11 is: 'A bill to establish taxing districts in this State, and to provide the means of local government for the same.' The objection is, that while the subject of the act is that of the title, it embraces many details, such as the conferring judicial powers on the executive officers of the corporation, and making certain official delinquencies felonies, which, while germane to the object of the act, are, it is said, independent subjects. Under a similar provision in the Constitution of other States to the one quoted, it has been uniformly held that only the general or ultimate object of the act need be stated in the title, and not the details by which that object is to be obtained. Dillon's Mun. Cor., Sec. 28, and cases cited. 'There has been a general disposition,' says Mr. Cooley, citing a large number of cases, 'to construe the consti-

[1] See same case, art. 1, sec. 16, p. 112.

tutional provisions liberally rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted.' Const. Lim., 146. And Nicholson, C. J., after stating and considering those purposes, announced as the conclusion of this court, that 'any provision of an act directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign thereto, should be held to be embraced in it. This court, thereupon, held that a provision for a tax on privileges was properly included in an act entitled 'An Act to fix the State tax on property.' Cannon *v.* Mathes. Upon like grounds a provision for the organization and sitting of courts in new counties was held to be properly embraced in an act entitled 'An Act to authorize the formation of new counties and to change county boundaries.' Brandon *v.* The State, 16 Ind., 197. And an act entitled 'An Act for revising and consolidating the laws incorporating the city of Dubuque, and to establish a city court therein,' was held to express only one object by its title, which was the revising and consolidating the laws incorporating the city, the court adding that the city court not being an unusual tribunal in such a municipality, might be provided by the act, whether mentioned in the title or not. Davis *v.* Woolreugh, 9 Iowa, 104. 'We think it plain,' says Folger, J., 'that an act creating a municipal corporation, and giving it the necessary legislation, taxing, judicial and police powers embraces but one subject.' Harris *v.* People, 50 N. Y., 601. And see to the same effect Village of Gloversville *v* Howell, 70 N. Y., 290, which was a suit for the recovery of penalties under 'An Act to reorganize the village of Gloversville.'

"The rule of construction upon which these decisions are based, is so obviously the dictate of good sense, that it has been adopted with entire unanimity by courts and text writers. And under the peculiar wording of our Constitution, which has been held to render the act void in toto where more than one subject is embraced in it, although only one is expressed in the title, a strict construction, as to the correctness of which I entertain grave doubts, it becomes very important to adhere to the suggestions of Judge Cooley, which are quoted with approbation by Chief Justice Nicholson, in 8 Heis., 519: 'The generality of a title,' says the eminent judge and writer, 'is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determined for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it.' Tested by these rules, it is clear that the provision touching the property of the corporation whose charter was repealed in the first of the acts under consideration was not an independent subject, and was properly embraced in the act.

For, it was not so much the enactment of a positive provision as the enunciation of a legal result of the repeal. Dill. Mun. Cor., sec. 30; Terrett *v.* Taylor, 9 Cranch, 43; and see what Cooley, J., says on this point in People *v.* Hurlburt, 24 Mich., 44. It related indirectly certainly, and perhaps we might say directly, to the subject of the act. And the same may be said, with even more certainty, of the details of the second act, all of which are 'directly or indirectly' connected with the local government, the creation of which was the subject thereof. The Constitution, it may be added, provides that 'the legislature may also vest such jurisdiction in corporation courts as may be deemed necessary.' Art. 6, sec. 1. And judicial duties, it is well settled, may be added to those proper to the office of mayor, recorder, or other executive of a municipal corporation. Dill. Mun. Cor., sec. 147; Trigally *v.* Memphis." Judges FREEMAN and TURNEY dissented. **70**, 427. [1]*Luehrman v. Taxing District of Shelby Co.* 1879.

Salaries of Public Officers — More than One Subject — Only One Expressed in Title. — FREEMAN, J., held: "The Act of the Legislature of 1879, entitled 'An Act to regulate and equalize the salaries of certain public officers,' is unconstitutional, because repugnant" to this provision. . . . "If an act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity." COOPER, J., dissented. **72**, 1. *The State ex rel. Knight Trustee v. McCann Clerk.* 1879.

Municipal Corporations—Act Providing Method for Abolishing and Amending Charter—Legislative Prerogative. — COOPER, J.: "The Act of 1881, ch. 122, is entitled: 'An Act prescribing a mode by which municipal corporations may surrender or abolish their charters.' The first six sections of the act are directed to this object. But the next three sections undertake to provide a mode by which any municipal corporation may amend its charter. The title and object of the first part of the act is, therefore, the abolishment of municipal charters, while the latter part of the act provides for a change or addition to their powers, and the continuance, instead of the extinction of their existence. No two objects could be more inconsistent, and the latter object is not expressed in the title. The act is, therefore, . . . unconstitutional and void.

"It is very true the latter sections of this statute are of the character of that 'extraordinary act,' as Judge McKinney styled it, which was passed upon in the State *v.* Armstrong. They undertake to authorize the board of mayor and aldermen, or other legislative council of the corporation, to prepare amendments of the municipal charter in the manner in which by-laws are adopted, and to submit the same to a vote of the qualified voters of the corporation, and if a majority vote therefor, to cause the same to be registered, whereupon, says the act, 'the

[1] See same case, art. 2, sec. 29; art. 7, sec. 4; art. 11, sec. 8.

amendments shall become a part of the charter.' The legislature seems willing to renounce its inherent prerogative to prescribe the powers of municipal corporations, and delegate the authority to the people of the locality. It would be somewhat difficult to sustain the constitutionality of these provisions. Chadwell *ex parte.* But it may be equally difficult to sustain the constitutionality of the other provisions. And the entire act falls clearly within the decision in the McCann case." 77, 379. *Murphy v. The State.* 1882.

Two Subjects in One Bill.—SNEED, J., held: "The [1]Act of March 23, 1875, ch. 94, par. 12, which provides a penalty for failure to comply with contracts made by persons for the delivery of produce, merchandise or property to parties advancing on the same, is unconstitutional, because the bill embraces more than one subject." Tenn. Leg. Rep., vol. 1, p. 371. *Gossett v. The State.*

Revenue Act of 1879 Constitutional.—Question: Was the Act of 1879 an amendment to the Assessment Act of 1877, and was the Act of 1879 in conflict with this section of the Constitution? After reviewing all the decisions on this subject in the State, T. M. JONES, Sp. J., said: "Let us now test the act in question by the principles laid down in these decisions. The general subject of the act is revenue. It is entitled 'An Act for the more rigid collection of the revenue,' and each and every section in the act has direct reference to the subject of revenue. It is true the act makes all collectors assessors to assess all property 'which by mistake of law or facts has not been assessed, and proceed to collect the same,' and while it is true, as argued by the counsel, that 'collection is a process beginning after assessment,' yet it is equally true that each has reference to the same subject, and the one is the means provided by the act for the attainment of the end expressed in the title, to wit: 'the more rigid collection of the revenue,' as it is evident that no taxes could be collected until this assessment was made. The provision in the act that suit may be brought for the recovery of these taxes by the issuance of a warrant by a justice of the peace in the name of the State, county or municipal corporations jointly or separately, and giving justices of the peace jurisdiction 'to try all such cases, no matter what the amount,' is liable to a more serious objection, but we do not deem it necessary to pass upon this provision of the statute, as this proceeding commenced by a petition for a *mandamus* in the Circuit court.

"If some of the provisions of the act are unconstitutional, because not indicated by the title, or for any other cause, yet it is an universal rule that so much of the act as is not in conflict with the Constitution must be sustained. Cooley on Constitutional Limitations, 148. Nor do we regard the act before us as an amendment to the act passed on the 9th

[1] See Acts 1879 p. 277.

of March, 1877. That act is entitled 'An Act to amend all laws for the assessment of property.' The Act of 1879 is 'for the more rigid collection of the revenue.' It does not repeal, or change, or modify any provisions of the Act of 1877. Its object is 'to assess all property which by mistake of law or facts has not been assessed' and collect the taxes which may be assessed upon the same." **76**, 595. [1]*The State ex rel. Gaines v. Whitworth Trustee.* 1881.

Title Need Only Express General Object.—COOPER, J.: "The Acts of 1881, ch. 87, and 1883, ch. 110, . . . in controversy are not in conflict with this section, for each act contains only one subject which is expressed in the title. The subject of the first act is to amend the charter of Fayetteville by changing the time for holding the election of aldermen, and this subject is expressed in the title. The subject of the second act is to amend the charter and the amendatory act, and this is also expressed in the title. The generality of the title, all the cases agree, is no objection. The title need only express the general object without specifying the details." **80**, 253. [2]*The State v. Wilson.* 1883.

"Such"—"Etc."—Meaning of—Act Punishing Keepers of Gaming Houses—Doubt in Relation to Constitutionality of Statute Should be Resolved in Favor of the Act.—TURNEY, J., held: "The [3]Act of 1883, ch. 230, embraces but one subject and is constitutional. 'Etc.' at the end and part of the title of an act means 'and others' and 'and so forth,' and is not to be rejected. 'Such' refers to something which has preceded and means 'of that particular character specified.' An act may be valid if the intention of the legislature can be intelligently gathered from the whole act, however awkwardly expressed. The object and purpose of the Constitution in providing that an act shall embrace but one subject, which shall be expressed in the title, is to give notice to the legislator of the subject of legislation, and it is sufficient so long as the subject matter of the act is germane to that expressed in the title, whether the body enlarges or restricts the title. If a statute admits two constructions, one of which would render it constitutional, and the other unconstitutional, the former would be adopted. And a doubt in relation to its constitutionality should be resolved in favor of the act." Judge FREEMAN dissented. **81**, 162. *Garvin v. The State.* 1884.

Legislative Acts—Duplicity—Barbering and Bathing on Sunday.—TURNEY, J., held: "The Acts of 1887, ch. 106, making it a 'misdemeanor for any one engaged in the business of a barber, to shave, shampoo, cut hair, or keep open their bath rooms on Sunday,' is void, because it embraces two distinct subjects, to wit, 'barbering' and 'bathing,' in violation of this section." **86**, 273. [4]*Ragio v. The State.* 1887.

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[1] See same case, art. 1, sec. 20, p. 191.
[2] See same case, art. 11, sec. 8; also M. & V., 1643.
[3] M. & V. 5691-2.
[4] See same case, art. 11, sec. 8.

Title and Subject of Revenue Act of 1889, ch. 130.—The act under consideration was 1889, ch. 130. LURTON, J., held: "Under the title 'An Act to provide revenue for the State of Tennessee and the counties thereof,' the manner and all necessary means for the collection of any tax properly levied by the act may be provided for." 88, 547. *Ex parte Griffin.* 1889.

Title Broader than Subject.—The [1]act under consideration was that of 1889, ch. 22. S. F. WILSON, Sp. J., held: "A statute having but one subject, and that subject expressed in the title, is not unconstitutional because the title is broader and more comprehensive than the provisions of the act." 90, 167. *Powers v. McKenzie.* 1891.

Matters Naturally Connected With Act, Included—Mechanics' Lien Law—Act 1889, Ch. 103.—CALDWELL, J., held: "The title of said act is sufficient, under the constitutional requirement, to cover all the foregoing provisions. That title is as follows: 'An Act to amend the mechanics' lien law, and to afford mechanics and material men greater security for their work and material.' . . . Where the title of a legislative act expressed a general subject or purpose which is single, all matters which are naturally and reasonable connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated, are properly included in the act, and are germane to its title." 90, 468. [2]*Cole Mf'g Co. v. Falls.* 1891.

Caption—Title—Substance.

Object of this Provision—Acts Pertaining to Salary of Adjutant General.—COOPER, J.: "The object of this provision of the Constitution was to prevent improvident legislation, and to direct the attention of the members of the legislature to the existing law and the proposed change. It requires a recital in the caption 'or otherwise,' which can only mean the preamble or body of the act of the 'title or substance' of the law affected. The 'title' of the Act of 1873 is nowhere mentioned in the Act of 1877. 'The substance of the Act of 1873 consists of the detail of the duties of the adjutant general, and the fixing of his compensation. The Act of 1877 does not purport to repeal the Act of 1873. It only purports to amend that act by lowering the salary of the adjutant general, repealing so much of it as provides a salary for that officer in excess of the amount appropriated, and modifies it accordingly. In substance it amends the previous act by changing the salary, leaving it in full force in other respects, namely in regard to the duties of the adjutant general. Obviously the Constitution, by the section cited, did not mean to require a recital of the substance of an act so far as it is not repealed or amended. That would be useless. What it did mean

[1] See Shan. Sup. to M. & V., p. 270.

[2] See same case, art. 1, sec. 8, p. 53.

was to have the 'substance' of that part of the act which is to be repealed or amended recited, so that the legislature may understand the effect of its action. The 'substance' of that part of the Act of 1873, which is amended by the act of 1877, is the amount of salary. And the question comes to this, does an act which fixes the salary of an officer at a given sum per month, and in the body of it expressly repeals or amends all previous acts which give a salary in excess of the specific amount appropriated, contain a recital of the 'substance' of a previous act which does give a higher salary? Thus put, the answer is too obvious to require further discussion. And to require a more specific recital would be useless for the purposes intended by the provision of the Constitution, and would unnecessarily hamper legislation." **69**, 735. *The State ex rel. v. Gaines Comp't.* 1878.

Justice of the Peace—Small Offense Law—Repeal of Statute—Art. 6, Sec. 14.—DEADERICK, J. "These cases present for determination the question of the validity of the [1]act of the last legislature, passed March 24, 1879, entitled 'An Act to give justices of the peace original jurisdiction of all misdemeanors, and to regulate appeals, in misdemeanors, from justices of the peace.' . . . The first section of the act, from its language, we think intends to give justices of the peace exclusive original jurisdiction in all criminal offenses known as misdemeanors, or cases where by laws existing at the time of the passage of the act, the penalty is a fine of not more than fifty dollars. It declares that all the offenses described 'shall be tried in the first instance by the justice of the peace,' and then in the second section makes provision for appeal to the Circuit or Criminal courts. The language employed, that 'all' these offenses 'shall be tried in the first instance by justices of the peace,' excludes the construction that any of them may be tried 'in the first instance' by the Circuit or Criminal courts. So that we entertain no doubt that the purpose of the act was to exclude the Circuit and Criminal courts from the exercise of original jurisdiction in misdemeanor cases, or cases in which the penalty is a fine not exceeding fifty dollars. Section 14 of article 6 of the Constitution ordains that 'no fine shall be laid on any citizen of the State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the term they find the fact, if they think the fine should be more than fifty dollars.' Pursuant to the foregoing constitutional provision, the legislature enacted that 'where an indictable offense is punished by fine, or by fine and imprisonment, the jury shall assess the fine if in their opinion the offense merits a fine of over fifty dollars.' Code, sec. 5237. All misdemeanors were thus punishable at the time of the passage of the Act of March, 1879. And while it is true that the judge can not impose

[1] M. & V. 5819.

a fine in a misdemeanor case exceeding fifty dollars, it is equally true that the jury, under the Constitution and law, in any misdemeanor case, may impose a higher fine. Thus it can not be said that a higher fine than fifty dollars can not lawfully be imposed upon any one guilty of the numerous offenses known as misdemeanors. And the act only purports to confer jurisdiction upon justices in cases where the penalty is not more than fifty dollars. But the act in question is obnoxious to another objection, which is fatal to it. It will be observed its purpose was to take away from the Circuit and Criminal courts original jurisdiction of misdemeanors and confer it upon justices of the peace exclusively, thus by implication repealing all acts then in full force and operation which conferred the jurisdiction upon said courts. Yet in the act which thus, in effect, repeals the acts giving such jurisdiction to the courts, no mention is made of the acts conferring the jurisdiction upon the courts, nor is any reference whatever made to them. The latter part of section 17 of article 2 of the Constitution requires that 'all acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended.' It is manifest that no such recital, as required, is made in the caption or in any part of the act. And for the omission of this important requirement of the Constitution, the act is repugnant to the Constitution, and therefore inoperative and void. In respect to the third section of the act, which in terms repeals sec. 4994 of the Code and the several subsequent sections constituting the 'small offense' law, it is proper to say that that section has not the effect to repeal the sections of the Code cited, because it was manifestly not intended by the legislature that those sections should be repealed, unless the other sections of the act should be operative. The purpose of the act was to extend, not to contract, the jurisdiction of the justices of the peace. The sections cited were repealed, because the other parts of the bill included and preserved the jurisdiction given in the repealed sections and extended it. And it was not intended that the repeal of these sections of the Code should be repealed 'except as a component part of the whole act.' Cooley Con. Lim., 185–6." **70**, 623. *McGhee et al. v. The State.* 1879.

Act Creating Judicial Circuit.—COOPER, J., held: "Under an act entitled 'An Act to create and establish a new judicial circuit,' a change in adjoining circuits by detaching one county from one of these circuits and attaching it to another, is sufficiently germane to the object as to be embraced in the caption as one subject, . . . and the positive provision takes the act out of that class of cases intended by that part of the same section of the Constitution which relates to 'acts which repeal' former laws." **71**, 332. [1]*The State ex rel. Williams v. McConnell.* 1879.

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[1] See same case, art. 2, sec. 18.

Two Acts Passed to Repeal a Law Construed as Part of Same Legislation.—The validity of the Act of 1879, ch. 127, was the question here. McFARLAND, J., held: "This section is to be liberally construed, otherwise useful legislation would be unnecessarily embarrassed. If the legislature pass an act repealing a law without reciting in its caption or otherwise, the title or substance of the law repealed, and a subsequent act is passed at the same session and within a few days of the same time as the first act, repealing the law which was attempted to be repealed by the first act, the two acts may fairly be supposed to have been in the minds of the legislators at the same time, and will be regarded as parts of the same legislation, and upon the passage of the last act, removing the constitutional objection to the former, it becomes valid in all respects." FREEMAN, J., dissented. **71**, 79. [1]*The State ex rel. Morrell et al. v. Fickle Chairman.* 1879.

Act Creating Taxing Districts and Altering a General Penal Law—Subject and Title—Separate Acts.[2]—COOPER, J.: "The act creating taxing districts of the second class can not be considered as an act to repeal or to amend the Act of 1877, for neither in its 'caption or otherwise' does it recite the 'title or substance' of the penal statute. Nor does it contain any such positive provisions upon the subject matter of the statute as would operate a repeal by implication. The sixteenth section, as we have seen, is merely negative in its language. The truth is, the legislature had a general intent to create a new class of municipal corporations, and a particular intent that this class of corporations should not be within the saving of the penal statute. The general intent is fully carried out in every respect, while the particular intent fails for want of the constitutional recitals or the positive language necessary for the purpose. And if there had been the proper recitals or language, the whole act would, perhaps, have been obnoxious to another provision of the section of the Constitution above cited, that 'no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.' For the creation of a class of municipal corporations, and the alteration of a general penal law can scarcely be considered as one subject, even if the general law bear upon all municipal corporations. And the result would be the same if the sixteenth section be treated as an attempt to exempt one class of corporations from the operation of a provision of a general law. And it is at least doubtful whether a separate act which undertook to exempt one class of municipal corporations from the provisions of a penal law applicable to all such corporations, would be constitutional." **78**, 484. *Lea v. The State.* 1882.

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[1] See same case, art. 2, sec. 2, p. 267.

[2] Act 1881, ch. 127; M. & V., 1677 et seq.; Act 1877, ch. 23; M. & V., 5673.

Legislature Must Determine How Broad Shall be the Object of a Statute—Revenue Act of 1879.—With reference to the Act of 1879, ch. 79, COOPER, J., said: "The act itself, as we have seen, is entitled 'An Act for the more rigid collection of the revenue.' All of its provisions are directed to the end of securing the assessment and collection of property which has been omitted from the regular assessment. To this end it prescribes the mode of procedure by which the assessment shall be secured and the collection made, increasing for this specific purpose the jurisdiction of justices of the peace. The details of the act are all included in the subject of the caption. The caption is general, but that is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it. Cooley Const. Lim., 176; Woodson *v.* Murdock, 22 Wall., 351; State ex rel. *v.* Whitworth." **79**, 56. *Wilson v. Benton.* 1883.

Receive on Deposit—Sale of Cotton—[1]Act Regulating.—TURNEY, J.: "The use in the caption to 'prevent sales of cotton' necessarily calls the attention to sales of every character and the steps ordinarily taken to effect them. The term 'receive on deposit' is used in the act in connection with sale, barter and exchange, and as a step to their accomplishment. The legislature must be understood to have meant 'to receive on deposit' with a view to sell, and as a step taken to put the article on the market. In short, the term 'sale' must be construed to include everything necessary to its consummation, the offer to sell being the initial move, a deposit for sale is an offer to sell. . . . We think the act does not violate the Constitution—that the act embraces but one subject in the title." **81**, 311. *Truss v. The State.* 1884.

Warehouse Act of 1879.—INGERSOLL, Sp. J., without discussion, decided in this case that the Warehouse [2]Act of 1879, ch. 236, was not in violation of this section. **83**, 239. *Bank of Rome et al. v. Haselton et al.* 1885.

Title of Amendatory Act—When Sufficient—Depends Upon Title of Original Act—Acts Prohibiting Sale of Liquor to Minors and Drunken Husbands—Purview Not Germane.—LURTON, J.: "By the Act of 1881, ch. 90, the sale or gift of liquors to minors, without the written consent of parents or guardians in writing, is prohibited. The title of this act is, 'An Act to prevent the sale, giving, or delivery of liquors to minors.' This act is carried into the Code (M. & V.) at section 5673. By the Act of March 26, 1883 (M. & V. Code, section 5674), it was attempted to amend the Act of 1881 by extending

[1] M. & V., 5683.

[2] M. & V., 2792.

the prohibition to sales or gifts to any husband who is an habitual drunkard, whose wife has given written notice prohibiting such sale or gift. The title of this amending act, 'A bill to be entitled an act to amend an act passed March 25, 1881, approved April 4, 1881, entitled an act to prevent the sale or giving or delivering liquors to minors.' The title to the amendatory act in no way indicates the character of the amendment beyond a correct recital of the title of the act amended. It is not, however, important that the title of an amendatory act shall do more than recite the title or substance of the act amended, provided the amendment is germane to the subject of the original act, and is embraced within the title of such amended act. In other words, if the title of the original act is sufficient to embrace the matter covered by the amendment, it is unnecessary that the title of the amendatory act should, of itself, be sufficient. State *v.* Bowers, 14 Ind., 195; Browder *v.* The State, 16 Ind., 197; Morford *v.* Unger, 8 Iowa, 82. . . . .

"The precise question to be determined in this case is, whether the title of the original act, entitled 'An Act to prevent the sale or giving or delivering liquors to minors,' is broad enough to embrace an amendment not relating in any way to the subject of prohibiting sales or gifts of liquors to minors, but which prohibits the sale or giving of liquors to drunken husbands. We are not at all disposed, as we have frequently announced, to construe this constitutional provision strictly. On the contrary, it should be given a liberal construction, so as not to embarrass legislation by a construction unnecessary to the accomplishment of the beneficial purposes for which it was adopted. . . . It is not to be doubted that the legislature might have, in one act, prohibited the sale of liquors to both minors and habitual drunkards, and that many other classes of persons might have been included within the prohibition. But in such case the title of the act should have been comprehensive enough to have included the several prohibitions. The title to the act in question is an exceedingly restrictive one. It clearly indicates that the subject of the act is the sale or giving of liquors to minors. The subject of the legislation is not the sale or giving of liquors generally, but the sale to a very limited class, to wit: minors. It would never occur to legislator or layman that under such an index would be found legislation prohibiting the sale of liquors to any other class of persons than minors. That the sale to drunken husbands is prohibited by this act is not indicated by the most liberal construction of its title. . . . It follows that the amendment in question has not been constitutionally enacted, and is not therefore a valid law." 87 109. *Hyman v. The State.* 1888.

Mechanics' Lien Law—Amendatory Statutes—Recital of Act Amended —"Revised Code."—The question was the validity of the Act of 1887, ch. 85. SNODGRASS, J.: "The act in question proposes to amend an

existing law, and the only reference to the law to be amended is contained in the first section in the declaration: 'That section 2746 of the Revised Code shall read as follows,' proposing a substitute for the entire section referred to. The objection is that the act does not recite in its caption or otherwise the title or substance of the act revised, repealed, or amended, as required. . . . The objection is well taken. If the act can operate as a valid law, it is upon the idea that it eliminates a section from the 'Code' of Tennessee and supplies its place with one of corresponding number.

"There is no 'Revised Code' of Tennessee, the legislature not having adopted or enacted any compilation of our statutes as such since the enactment of the Code of 1858, which, being the first Code, is not itself a revision. It therefore follows that it is not the amendment of a recognized law to amend the 'Revised Code,' nor is it necessarily the amendment of a law to amend any section of such supposed Code by number. It may be that in point of fact a given section of any compilation to which the legislature might refer, and specifically identify in an amending act, would turn out to be a correct reprint of an existing law; but it is not so by force of its existence in such compilation, or by reason of its having a particular sectional number therein, as is the case in the Code enacted. Therefore, to make an amending act valid, there must be something more than the recitation in the Act of 1887. It will be remembered that, while we have no 'Revised Code' in law, we have in fact two valuable compilations of the Statutes of Tennessee, to either of which this term is often applied, and to both of which it can be applied with equal accuracy. If it will be assumed, as argued, that one of them is referred to, it can not be told which. Neither is identified by any distinctive legal term applicable to it, or more applicable to it than to the other. Nor is the identification made or attempted by designation of the compilers or otherwise. So that not only is no law, by title or substance, *recited* in the repealing statute, but no *law* is referred to, and, worse still, no book in which it can be found is named or identified in the reference.

"It is argued, however, that it can be made to appear by inference that the repealing act was intended to amend the mechanics' lien law contained in the last compilation of our statutes by Milliken & Vertrees, because the amending act designates the number of a section, of which the corresponding number there is upon that subject, while the same is not true of the other compilation. The answer to this is, first, that surely no such inferential method of establishing an amendment could be resorted to in opposition to the plain terms of the constitutional provision cited, requiring that the amendment shall actually 'recite the title or substance of the *law* amended'; and, second, that such inferential deduction by comparison can not be made to determine the application

of this act or the intent of the legislature to refer to that 'revision,' because the act in effect merely strikes out an entire section—not indicating on what subject it is, and therefore not, of course, confining its repealing operation to a section upon the same subject as that to be substituted—and substitutes another. There is no reason why it may not, therefore, as well eliminate and replace the corresponding number in one compilation as the other." 87, 126. *Burnett v. Turner.* 1888.

Caption of Amendatory Statutes—Particular Character of Amendment.—The Act under consideration was that of 1887, ch. 144. LURTON, J., held: "The caption of an amendatory statute need not indicate the particular character of the proposed amendment, provided the title of the original act is therein set out, and the purview of the amendatory statute is germane to, and embraced within, the title thus recited." This act was declared to come within this rule. 87, 163. [1] *The State ex rel. Whitson v. Algood.* 1888.

General Rules of Construction—[2]Acts Relating to Consolidation of Railway Corporations—Legislative Power.—The statutes under consideration in this case were Acts of 1877, ch. 72, sec. 3, proviso 3; Acts 1881, ch. 9, sec. 1, relating to the consolidation of railway corporations. LURTON, J., held: "Railroad corporations can not, without legal permission, consolidate with each other, or sell, lease, or mortgage their property; and therefore the legislature may couple with the grant of those powers such conditions and limitations as it chooses to impose. That is a valid and constitutional limitation upon the power of consolidated railway companies to make mortgages imposed by third proviso of the third section of the Act of 1877, amendatory of 'the law in relation to the consolidation of railways,' which inhibits any railway corporation thereafter 'to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom for timber furnished and work and labor done on or for damages done to persons or property in the operation of its railroad in this State.'"

The Act of 1877, containing the restrictive proviso as above stated, was entitled "An Act to amend the law in relation to the consolidation of railways." It extended the powers granted to existing railroads by Acts of 1871 and 1875 to any railroads then existing or thereafter created, with the limitations therein set out. The former acts had conferred upon existing railway corporations very ample power to consolidate and to issue bonds and make mortgages. LURTON, J., held: "The proviso in Act of 1877, limiting power of consolidated railway corporations to make mortgages, is germane to the title of the act; and that the act, as a whole, has but one subject, which is sufficiently expressed in

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[1] See same case, art. 2, sec. 18, p. 301; art. 2, sec. 21, p. 302.

[2] M. & V. 1250 et seq.

the title." And further: "The Act of 1881, conferring the power to make mortgages upon all railway companies, in very broad terms, does not repeal the special limitations imposed by the Act of 1877 upon the power of consolidated railway companies to make mortgages of their property." He also held: "The generality of the title of an act does not render it obnoxious to constitutional objection, so long as it is not made to cover legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection. Within these limitations the legislature must determine for itself what particularity shall be employed in the titles of acts. And 'any provision of an act directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith, and not foreign thereto, should be held embraced in it." 88, 140. *Frazier v. Railway Co.* 1889.

When Two Statutes Repeal Another—Repeal of Repealing Statute—Effect on Statute Repealed.—The defendant was indicted for illegally selling liquors. After reviewing the history of the statutes on this point, TURLEY, J., said: "We will now proceed to examine the grounds upon which the defense in this case is made to rest. First, it is said that the Act of 1838, ch. 120, only repeals the Act of 1831, ch. 80, which authorized every person, upon the payment of twenty-five dollars, to procure a license to retail spirituous liquors, and so much of the fourth section of the Act of 1835, ch. 13, as required the keeper of an ordinary in addition to his tax of five dollars for such license, also to pay twenty-five dollars additional tax for the privilege of retailing spirituous liquors. And that the necessary consequence is, that inasmuch as these statutes operated as a repeal of the Acts of 1811, ch. 13, and 1823, ch. 33, their repeal again sets up the Acts of 1811 and 1823. To this objection it is answered, first, that though it may be true that the Act of 1838 only repeals the Act of 1831 and part of the Act of 1835, yet neither the Act of 1811 nor 1823 can be set up thereby, because the Acts of 1811 and 1823 are also repealed by the Act of 1832, ch. 34, which is not repealed by the Act of 1838, and this upon the principle of the construction of statutes, that when two statutes repeal another, a repeal of one of the repealing statutes will not again set up the statute repealed. We recognize the correctness of the legal principle, and the only question then is, whether the Act of 1832 is a repeal of the Acts of 1811 and 1823? We think it is." 19, 253. *Dyer v. The State.* 1838.

Repealing Act Reciting in Caption Title Only of Old Act, Valid.—By sections 39 to 49, inclusive, of an act passed February 25, 1870 (prior to Constitution of 1870), Athens was granted a legislative charter. This act embraced several distinct subjects, and its title contained no reference to this part of its subject matter. By an Act passed in 1879

this charter was repealed. The repealing act gave no intimation, either in its caption or body, of the nature of the legislation to be repealed, but recited in its caption the title of the Act of 1870, and in express terms repealed sections 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49 of chapter 69 of an Act passed February 25, 1870. SNODGRASS, J., held: "This repealing Act of 1879 does sufficiently recite in its 'caption or otherwise the title or substance of the law repealed.'" 91, 21. *Ruohs v. Athens.* 1891.

Act of 1891, Ch. 101—Repeal by Implication.—LURTON, J., held: "The title to Act of [1]1891, ch. 101, though containing unnecessary details and particulars, is single, and embraces but one subject, and that the subject is fully expressed in the title." He reaffirmed the doctrine that "the constitutional provision requiring laws repealing or amending former laws to recite in the caption or otherwise the law repealed or amended, does not apply to repeals or amendments which result from necessary implication." 91, 491. [2]*Railroads v. Crider et al.* 1892.

Amendatory Statute—Reciting Subject of Statute Amended.—LURTON, J., held: "The constitutional requirement that amendatory statutes shall recite in their 'caption, or otherwise,' the 'title or substance' of the statute amended, is satisfied by the recital of the *subject* of the statute amended in the *body* of the amendatory statute, without more. . . . Section [3]4881 (T. & S.) Code makes horse-racing legal when run upon a regular track. Acts 1891, ch. 115, amends said section of the Code by providing 'that said section and this amendment shall apply to trotting and pacing races as well as running races.' The amendatory act sufficiently recites the 'substance' or subject of the original statute —to wit, horse-racing—and is valid. . . . *Question reserved:* Is it a sufficient recital of the 'title' of the act amended to refer to it in caption or body of amendatory act as a designated section of the Code of Tennessee?" 91, 716. *Ransome v. The State.* 1892.

Recitals in Amendatory Statutes—Act 1889, Ch. 161—Code of Tennessee.—"The Constitution requires that amendatory statutes 'shall recite in their caption or otherwise the title or substance' of the law amended. A [4]statute amendatory of the Code was entitled 'An Act to amend section 4652, sub-section 16, of the Code of Tennessee,' and contained in its body substantially the same description of the law amended. This statute contained no reference to the substance of the law amended." CALDWELL, J., held: "The amended law is sufficiently recited in both the caption and body of the amendatory act.' . . . The compilation of 1858 is entitled 'An Act to revise the statutes of the State of Tennessee.' It is provided therein that this compilation is to be designated

[1] Shan. Sup. to M. & V., p. 116.
[2] See same case, art. 11, sec. 8.
[3] M. & V., 5701, Acts 1891, ch. 115.
[4] Shan. Sup. to M. & V., p. 278.

as the 'Code of Tennessee.' Hence either title may be used in the recital of an amendatory statute." 92, 320. *The State v. Runnels.* 1893.

Latest Construction of Entire Section.

Doctrines Announced in Previous Cases Reaffirmed—The Provision as to Subject of Statutes Mandatory—Rule as to Generality of Title—"Caption" Synonymous with "Title"—"Otherwise" Refers to Body of Act—Singleness of Statute—Repealing Statutes—Implication—Act of 1895, Ch. 67, to Protect Innkeepers, Valid.—CALDWELL, J., held: "The constitutional requirement that a statute shall not embrace more than one subject, which shall be expressed in the title, is mandatory. A statute framed in contravention of this provision is invalid. Generality of the title of a statute is not objectionable unless it is made to cover legislation incongruous in itself or foreign to its object. It is sufficient if the title describes with adequate clearness the general purpose and scope of the act. It is not essential that the title be made an index or epitome of the statute, nor is it necessary that the title should set forth the modes, means, or instrumentalities which may be provided in the statute for its administration and enforcement. All matters which are naturally and reasonably connected with the subject of a statute, either directly or indirectly, and all measures which will or may facilitate the accomplishment of the purpose of the statute, are properly included in it. . . . The word 'caption' is synonymous with 'title,' and the word 'otherwise' refers to the body of the repealing, reviving or amending act. Repeals, amendments and revivors of statutes by implication are not within the constitutional requirement that 'all acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended.' That a statute contains an express general repealing clause does not bring it within the constitutional requirement that the title or substance of the repealed act shall be recited in the caption, or otherwise, by the repealing statute. The presence or absence of this repealing clause is unimportant in determining the character of the statute.

"The title 'An Act to protect hotel, inn, and boarding-house keepers,' sufficiently complies with the constitutional requirement that the subject of a statute shall be expressed in its title. The subject expressed in this title is the protection of the classes named, and . . . embraces only one subject, viz., the protection of the classes mentioned. . . . Although, in several sections, it provides (1) that certain fraudulent acts, to the prejudice of hotel, inn and boarding-house keepers shall be misdemeanors; (2) what shall constitute *prima facie* evidence of fraudulent intent in prosecution of those acts; and (3) for the sale of baggage and other property left by defaulting patrons of hotels, inns and boarding houses." 95, 546. [1]*The State v. Yardley.* 1895.

[1] See same case, art. 1, sec. 6, p. 12; sec. 18, p. 132.

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ART. 2, SEC. 18. Every bill shall be read once on three different days, and be passed each time in the house where it originated before transmission to the other. No bill shall become a law until it shall have been read and passed on three different days, in each house, and shall have received on its final passage, in each house, the assent of a majority of all the members to which that house shall be entitled under this Constitution, and shall have been signed by the respective speakers in open session—the fact of such signing to be noted on the journal; and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this Constitution.

[Const. 1834, art. 2, sec. 18. "Every bill shall be read once on three different days, and be passed each time in the house where it originated before transmission to the other. No bill shall become a law until it shall have been read and passed on three different days in each house, and be signed by the respective speakers."]

[Const. 1796, art. 1, sec. 15. "Every bill shall be read three times, on three different days, in each house, and be signed by the respective speakers before it becomes a law."]

ART. 2, SEC. 19. After a bill has been rejected no bill containing the same substance shall be passed into a law during the same session.[1] [Same as Const. 1834, art. 2, sec. 19; Const. 1796, art. 1, sec. 16.]

ART. 2, SEC. 20. (The style of the laws of this State shall be: "Be it enacted by the general assembly of the State of Tennessee.") No law of a general nature shall take effect until forty days after its passage, unless the same or the caption, shall state that the public welfare requires that it should take effect sooner. [Const. 1834, art. 2, sec. 20, and Const. 1796, art. 1, sec. 17, contained only the clause in parenthesis.]

ART. 2, SEC. 21. Each house shall keep a journal of its proceedings and publish it, except such parts as the welfare of the State

[1] 69 120.

may require to be kept secret; the ayes and noes shall be taken in each house upon the final passage of every bill of a general character, and bills making appropriations of public moneys; and the ayes and noes of the members on any question shall, at the request of any five of them, be entered on the journal. [Const. 1834, art. 2, sec. 21, read "any two" instead of "five;" otherwise same as above.]

[Const. 1796, art. 1, sec. 18. "Each house shall keep a journal of its proceedings and publish them, except such parts as the welfare of the State may require to be kept secret; and the yeas and nays of the members on any question shall, at the request of any two of them, be entered on the journals."]

Amendments—Entries on Journals.

Bank Charter—Amendments Upon Third Reading of Bills.—CARUTHERS, J.: "A more plausible constitutional objection, to say the least of it, might be made to this charter, if the fact be, as assumed, that the section containing it was offered and adopted as an amendment on the third reading of the bill, grounded on the eighteenth section. . . . The intention of this requirement is to insure full consideration and mature reflection upon every measure before them, and that no bill shall be hastily and inconsiderately passed. If this mode had been adopted in a case like the present, the time intervening between the different readings and the repeated readings of the bill would probably have caused some one to think of turning to the Act of 1843 and bringing its contents before the house, if, indeed, the fact were as stated, that this was not done, nor its contents known to the members—that is, that they were voting in the dark, and in utter ignorance of what kind of law they were making. We have already said that we are forbidden by our respect for that honorable body to arrive at a conclusion so disparaging to them. Yet it is certain that conformity to the Constitution, in this respect, would tend to prevent such an occurrence as that presented in the argument. It is said that it is not unfrequently the case, and that the fact was so in this instance, that provisions entirely distinct from those in a bill will be thrown on, under the name of amendments, on the third and last reading in both houses, and sent to the house where the bill originated for concurrence, when a favorable action will make it, as well as the original bill, the law of the land. Now, this has the appearance, at least, of an evasion of the Constitution. If the new matter is not germane to that of the original bill, it would seem to be a new bill, although it may be called an amendment, and, if so, should be read three times, instead of once, in each house. But the case before us does not call for an adjudication of this question, and it is only referred to now as one of sufficient importance to be maturely considered of by the legislature and the profession. It is certainly a very unsafe and improvident mode of legislation, and not to be favored. How this question should be brought up, and what would be the decision upon it, is left for a case in which it may arise." **35**, 626. [1]*Ferguson v. Miners etc. Bank.* 1856.

[1] See same case, art. 2, sec. 2, p. 252; art. 2, sec. 21, p. 302; art. 11, sec. 8.

Failure of Journals to Show All the Readings of Bills.—COOPER, J., held: "The mere fact that the journals of the senate fail to show the second reading of a bill, will not affect its validity as an act, when it appears that it was passed on three several readings in the house of representatives, and two readings in the senate, one of them purporting to be the third reading, at which time it was passed with all the requisite formalities, and that it was signed by the speaker of each house in open session, and approved by the governor, in accordance with the requirements of the Constitution." 71, 332. [1]*The State ex rel. Williams v. McConnell.* 1879.

Amendment to Bills—Concurrence of the Houses—Journals as Evidence—Salaries of Judges.—By chapter 3 of the Acts of 1879, the salaries of judges "hereafter appointed or elected" were fixed at $2,000 per annum, and the previous law under which the judges got $2,500, was repealed. Horrigan was appointed by the governor on August 1, 1879. MCFARLAND, J.: "It is earnestly maintained that as it is shown that the senate did not concur in the amendment of the bill adopted by the house, that the bill as published never did receive the assent of the two houses. Many authorities are referred to to show that notwithstanding an act has the signature of the two speakers and the approval of the governor, and is published by proper authority, nevertheless the courts may look to the journals of the two houses, and if from them it appears that the bill was not constitutionally passed, the act must be declared void. Such seems to be the decided weight of authority. Whether this rule would prevail to its full extent in view of the *new* provision of our present Constitution, requiring all bills to be signed by the respective speakers, *in open* session, and the fact of such signing to be noted on the journals, need not, in the view we have taken of the question, be definitely settled. It might be plausibly argued that this provision was intended to furnish conclusive evidence that the bills, in the form finally signed by the speakers, were the bills actually passed by the two houses. The act being performed in open session, it could hardly occur that the signatures should be affixed to bills never actually passed, without some member of the body discovering the mistake. It would seem this ought to be evidence of as high authority as the journals, at least as to all matters not expressly required to be shown by the journals. However, we do not mean to intimate any decided opinion upon this question.

"We hold that conceding the journals to establish all that is claimed, the bill was not amended in the house so as to change its legal import and effect. According to the opinion of a majority of this court at the present term, the first section of this act would have effected a valid

[1] See same case, art. 2, sec. 17, p. 287.

change of the law if the second section had been omitted altogether. The second section only purports to repeal so much of the previous law as conflicts with the first section. . . .

"It is earnestly argued that it would be a very great stretch of judicial power for a court to undertake to say that the amendment is immaterial; that this was a question for the two houses of the legislature; that it was enough for this court to see that the bill was *amended* in the house, and the senate did not concur in the amendment; that we can not look beyond to see in what the amendment consisted. But it seems to us that it would be the exercise of a power far more arbitrary and unwarranted for the court to declare the act of the supreme legislative authority void upon an objection like this, in which there is no substance. If we may look to the journals to see that *in form* there was an amendment not concurred in, we may look further to see that *in substance* there was no amendment. We have no direct authority upon the point, but we are of opinion that the act can not be declared void, for the reasons given. The bill did receive the assent of both houses in the constitutional mode." FREEMAN, J., dissented. 72, 610. [1]*Gaines Comptroller v. Horrigan.* 1880.

Journal May be Looked to, When—Ayes and Nays.—It was insisted in this case that ch. 21 of the Acts of 1879 had not been passed according to the constitutional requirements. After reviewing the facts, MCFARLAND, J., said: "From these facts we are of opinion that the principal objections taken to the bill do not exist in fact; that the bill was passed, the amendment of the senate concurred in by the house, the bill signed by both speakers in open session, and the fact noted upon the journals. Notwithstanding the confusion in the numbers, we think these facts do sufficiently appear. The only question, therefore, that is raised by these facts is, whether the failure of the journal of the house to show affirmatively that the bill received on its third reading the constitutional majority, is fatal. The rule is, that the journals may be looked to in order to determine whether the bill was in fact passed, but every reasonable presumption must be made in favor of the action of a legislative body acting in the apparent performance of its legal functions. The courts will not presume, from the mere silence of the journals, that the house had disregarded the constitutional requirements, *unless where the Constitution expressly requires the fact to appear on the journals.* Cooley Con., secs. 135, 136. Our Constitution does not require that the ayes and noes shall appear on the journal, or that it shall affirmatively appear that the bill received the constitutional majority. We will not, therefore, presume that this bill was declared *passed*, when in fact it was not, especially when we see that it was afterward signed

[1] See same case, art. 6, sec. 7.

by the speakers in open session, and the fact announced and entered upon the journals. We hold the law to have been constitutionally passed, and the judgment will be affirmed." **74**, 553. *Williams v. The State.* 1880.

Passage of Laws—Entries on Journals—When They May and May Not be Looked To.—The question here was the constitutionality of the Act of 1887, p. 232. SNODGRASS, J.: "If all the entries in the journals can be looked to, it appears affirmatively that this bill was rejected. But it is most earnestly argued that section 18 of article 2 of the Constitution, which requires, among other things, that a bill, after being passed, shall be 'signed by the respective speakers in open session, the fact of such signing to be noted on the journals,' is the only mandatory provision for a journal entry; and when such entries appear on the journals of both houses (as in this case) all inquiry is cut off, and any affirmative proceeding, irregularity, or omission is cured or supplied, and the bill must be conclusively held to have passed as required by the Constitution. This view is plausible, and is supported by much persuasive authority in other States, but we do not assent to its correctness. The Constitution of this State requires the keeping of a journal by each house, in which its proceedings shall be written, and that it shall be published. Art. 2, sec. 21.

"There is no provision which, in terms, gives one entry a force and validity superior to another, and we can not undertake to do so by construction. Besides, we think there is another section of our Constitution which provides, by clear implication equivalent to positive direction, for keeping a record of the rejection of bills, as well as of their passage or purported passage. The nineteenth section of article 2 declares that 'after a bill has been rejected, no bill containing the same substance shall be passed into a law during the same session.' It manifestly contemplates that the record shall show the rejection of any bill offered, and if it does show it, that no other of the same substance can be constitutionally passed. If it should then appear from the journal of either house that a similar bill had been before rejected during the same session, and subsequently this one regularly passed, we would be compelled to look to the journal to ascertain the rejection of the first, and, having done so, to declare the last void for this reason.

"Now, it would be a strange construction to hold that we might look to the journals to ascertain whether another had been so rejected as to make the one considered void, but could not look to the same journals to ascertain whether the act involved had been itself rejected. If it was an answer that the entries showing that the bill was signed by the speakers of both houses in open session must be treated as conclusive that the former entry of rejection was erroneous, or had been vacated, it would be equally an answer to the same objection in respect to the

apparent previous rejection of another similar bill; for it might be presumed that the entry of rejection had been rescinded, and the action so apparently made of record reconsidered. The same presumption that the legislature would do its duty in respect to compliance with section 19 arises that prevails with regard to any other section.

"To indulge in such presumptions in the face of affirmative evidence on its own record to the contrary would operate to amend the constitutional provision quoted, so as to make it read that 'after a bill has been rejected, no bill containing the same substance shall be passed into a law during the same session. But if such bill is passed, it shall be presumed that no other of the same substance was rejected, and the one so passed shall be valid.'

"We held at Nashville in the baseball case (Hayes *v.* The State) that while the journals would be considered in determining the validity of an act of the legislature, every reasonable inference and presumption would be drawn and indulged in favor of the regularity of its passage, and where it did not affirmatively appear not to have passed, and such legitimate construction could be given to the record as sustained the law, it would be done. But in doing so we went as far as sound reason and authority require. We hold now that irregularities will be cured and omissions supplied by presumption, but where it affirmatively appears that a bill was rejected, the journal entry so showing can not be disregarded, and the act is void." 86, 734. *Brewer v. Mayor etc. of Huntingdon.* 1888.

Entries on Journals—Presumptions—When in Favor of Regularity of Passage.—Act under consideration that of 1887, ch. 144. LURTON, J., held: "Where an act of the legislature has been signed by the respective speakers of both houses in open session, and that fact noted on the journals, and has been approved by the governor, every reasonable presumption and inference will be made in favor of the regularity of its passage, and it will be upheld unless the journals affirmatively show that it was defeated." In delivering the opinion he said: "We think the rule well settled that where the journal does not affirmatively show the defeat of the bill, every reasonable presumption and inference will be indulged in favor of the regularity of the passage of an act subsequently signed in open session by the speaker. . . . The journal does not show affirmatively that this bill did not pass. The motion to reconsider, being duly entered, postponed the final fate of the bill. We know, as a matter of history and common political experience, that it is not unusual for a bill to be defeated and the adverse vote subsequently reconsidered and the bill finally passed. The Constitution requires that after a bill has passed three readings in each house, 'it shall be signed by the respective speakers in open session, the fact of such signing to be noted on the journals.' The fact that, after an adverse vote, a motion

to reconsider was entered, and that the journal does not show any disposition of this motion, and that subsequently this bill was signed in open session by the speaker of the senate, as shown by the journal, authorizes us to presume that the failure of the journal to show the final passage of this bill is due to a clerical omission. This is, under the law applicable, the legitimate construction to be placed upon the whole record." 87, 168. [1]*The State ex rel. Whitson v. Algood.* 1888.

Laws of General Character—Ayes and Noes.

Bill of General Character Applies to Such Statutes as Affect Rights of the People.—CARUTHERS, J.: "It is insisted that the act chartering the plaintiff is invalid upon another ground; that is, the journals do not show that the ayes and noes were taken and recorded upon its final passage, as required by the Constitution, art. 2, sec. 21. The provision is that 'the ayes and noes shall be taken in each house on the final passage of every bill of a general character, and bills making appropriations of public moneys.' Whether this would be regarded as only directory upon the members who were acting under an oath to support the Constitution, of which it is a part, or that it would be presumed that they had complied, and the clerk had failed to enter it upon the journal, it is not necessary to decide in this case, because this was not 'a bill of a general character.' That description was evidently intended to apply to such statutes as would affect the rights of the people at large, or all that might be embraced in a certain category—as, all banks, all sheriffs, etc. Mayor and aldermen of Alexandria *v.* Dearmon. This was an act to create a private corporation, to bring into existence a new artificial person, and can not in any legal sense be regarded as of a 'general character.'" 35, 625. [2]*Ferguson v. Miners etc. Bank.* 1856.

Act Changing County from One Circuit to Another—Laws of a General Character—Special Laws—Appropriations—Ayes and Noes.—The Act under consideration was that of 1887, ch. 144, changing White county from the sixth to the fifth circuit. LURTON, J.: "Is this such a bill as requires the ayes and noes to be taken? This depends upon whether it is a bill making an appropriation of public moneys or a bill '*of a general character*' within the meaning of the Constitution. It is clearly not an appropriation bill. The very able counsel who have argued this cause for complainant insist that every law which is a public law is a bill of a general character. Any number of authorities have been cited to show that bills chartering banks and municipal corporations are public laws, and not private acts. This is conceded, but this is not the question. The legislature is, by another provision of the Constitution, prohibited from passing any private or special acts. All laws

[1] See same case, art. 2, sec. 17, p. 292; art. 2, sec. 21, this page and the next.
[2] See same case, art. 2, sec. 2, p. 252; art. 2, sec. 18, p. 297; art. 11, sec. 8.

must be general in the sense that they must apply to all alike. But if the framers of the Constitution used the phrase 'laws of a general character' in contradistinction to private or special laws, then why was it necessary to add: 'And laws making an appropriation of public moneys?' The greater would have included the less. Appropriation bills are not private or special laws. We think the phrase 'laws of a general character' is used to distinguish general legislation—legislation in which the whole body of the people have, or may have, an interest—from legislation of a purely *local* character. Laws may be public in their objects and either general or local in their application. Thus, a law creating a new county, or changing a county line, or moving a county site, or creating a municipal corporation, would be public laws; and yet they would be local and not general in their application. They would not be laws of a general character, but laws of local application. The act in question changed two counties from one to another circuit, and fixed the terms for the courts of one or two others. Such a law is not a 'law of a general character,' but a law limited and local in its application. The constitutional provision relied upon was not applicable to such legislation." 87, 170. [1]*The State ex rel. Whitson v. Algood.* 1888.

When Statute Takes Effect—Journals, Etc.

When Statute Begins to Run—"From and After" its Passage.—SHACKLEFORD, J.: "When the act has been signed by the speakers of both houses (as it must be to become a law), it takes effect from its passage by relation, and not from the time it is signed by the speakers. And if it be a repealing statute, it avoids any act done by authority of the repealed law in the interval, between its passage and signing. Meigs' Rep., 237.

"In the act under consideration a period of about seven months is fixed before it goes into operation. The object and purpose of the law was to induce parties to bring money into the State, by an increased rate of interest, to loan it at ten per cent, which had been previously prohibited, and under the provisions of that act this note was executed. Did the legislature intend by the use of the words '*from and after*' that the act should go into effect on the 2d day of September? If so, the word '*from*' would convey no meaning, and should not have been used. Without the use of that term, '*after*' would convey the meaning that it took effect on the 2d of September. By the use of the words 'from and after' (that is, on the 1st day of September, 1861, and after that time) the law should have full force and effect. We are, therefore, of the opinion that the act in question took effect on the 1st day of September, 1861, and after that time it was in full force and effect until it

[1] See same case, art. 2, sec. 17, p. 292; art. 2, sec. 18, p. 301.

was repealed. The solution of the second proposition must depend upon the construction to be given to the second section of the act under consideration." **43**, 460. [1]*Turner et al. v. Odum.* 1866.

When Statute Takes Effect Forty Days from End of Special Session. —TURNEY, J. "An adjournment to a day certain, to hold a special session, does not put acts passed in operation until forty days from end of the latter session.[2]" **48**, 311. *Day v. McGinnis.* 1870.

Forty Days From Passage—How Computed—Statute Passed, When.—DEADERICK, J., held: "The time at which an act of assembly takes effect, forty days after its passage, is ascertained by computing from the date of its signature by the governor, or its final passage over his veto." **50**, 443. *Logan v. The State.* 1872.

Forty Day Clause—Act Repealing Charter of Village Not a General Law.—FREEMAN, J., upon a petition to rehear, said: "Another question, however, is now for the first time presented, but which is fairly raised by the facts of the agreed case. It is, that the act repealing the charter of the town of Hartsville did not take effect until forty days after its passage, under art. 2 sec. 20, of the Constitution of 1870. The act was passed March 28, 1879, and approved by the governor on the 31st. The whisky in this case is charged to have been sold on the 1st day of May, 1879, consequently in less than forty days after the passage of the law. The concluding clause of the statute is, 'that this act shall take effect from and after its passage.' The clause of the Constitution referred to is, 'No law of a general nature shall take effect until forty days after its passage, unless the same or the caption shall state that the public welfare requires it should take effect sooner.' Now, if this was a general law, in the sense of the Constitution, it would be clear the law could not take effect till forty days after its passage. But then the law repealing the charter of a village is not a general law, one equally operative in every part of the State, or upon all individuals who may bring themselves within its provisions. No town in the State could be affected by this repeal except the town of Hartsville, nor was intended to be. It is as special as a law can be, operating upon only one single village of the State. It, therefore, is not included in this provision of the Constitution, and the objection fails." **71**, 477. *Johnson v. The State.* 1879.

Statute Takes Effect When Formalities are Complete—Governor's Approval.—COOPER, J.: "Under the Constitution of 1834, of this State, it was held that upon the signing of a bill by the speakers of the two houses, after its passage by the legislature, 'the law takes effect from

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[1] Overruled on another point by Jackson *v.* Collins, **49**, 499.

[2] See **39**, 38. T. & S., 162.

the date of its passage by relation.' [1] Dyer *v.* The State. The reason given was that the duty performed by the speaker in signing the statutes is not of a legislative but ministerial character. The absurd doctrine of the common law, that a statute might go into effect before the formalities prescribed to give it effect had actually been performed, was still adhered to. The Constitution of 1870, art. 2, sec. 20, provides: 'No law of a general nature shall take effect until forty days after its passage, unless the same or the caption shall state that the public welfare requires that it shall take effect sooner.' And by sec. 18 of the same article it is further provided, among other things, that no bill shall become a law until it 'shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal, and shall have received the approval of the governor, or shall have been otherwise passed under the provisions of this Constitution.' The provisions thus alluded to are . . . to the effect that the bill shall become a law without his signature if passed by a majority of each house over his veto, or if the governor fail to return the bill with his objections within five days, Sundays excepted, after it shall have been presented to him, and the general assembly continues in session so long. These constitutional provisions establish as the present rule that an act takes effect when the formalities of enactment are actually complete under the Constitution, and not sooner, even where the legislature says that it shall take effect from its passage. It is passed when the constitutional formalities are completed." 73, 728. *Hill v. The State.* 1880.

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[1] In the case of Dyer *v.* The State, 19, 253, decided in 1838, TURLEY, J., said: "It is said in defense that Dyer, on the morning of the 27th of January, 1838, applied to the clerk of the County court of Davidson for a license to retail spirituous liquors, which was refused, although there was then no law in existence prohibiting it. The Act of 1838, ch. 120, had passed both houses of the legislature on the 26th of January, 1838, but was not signed by the speakers till the evening of the 27th. And it is contended that the act had no validity till this was done, and, therefore, could not have taken effect at a period anterior thereto. . . . We think the law takes effect from the date of its passage by relation. The duties to be performed by the speakers in signing the statutes is not of a legislative, but ministerial character. And to cause the operation of a law to depend upon the period of time when this duty was performed, would introduce too great uncertainty in the administration of justice, as there would be nothing but the memory of man to resort to for the purpose of ascertaining it, the signature not being dated and there being no record of the time kept."

NOTE TO THIS CASE—"Statutes take effect upon the most remote and secluded portions of the State from the time of their passage, not allowing a single moment for gaining intelligence of their passage, a principle of law destitute of every semblance of reason and fraught with hardship and severity. It is not quite so bad, however, as the old English rule, by which, if no period was fixed by the statute itself, it took effect, by relation, from the first day of the session in which the act was passed. This rule was abolished by an act of 33 George III. 1793, by which statutes are to have effect only from the time they receive the royal assent. The settled principle of American law is declared by MARSHALL, C. J., in Matthews. *v* Jane, 5 Cond., 270, to be, 'that a statute, for the commencement of which no time is fixed, commences from its date;' the constitutional prohibition of *ex post facto* and retrospective laws having annulled the ancient rule of the common law. The statutes of the United States take effect from the day of their approval by the president, that being the day of their date. The same rule, of course, applies to the statutes of those States in which the executive is so far a branch of the legislative department as that his concurrence in its acts are necessary to their perfection. But in those States where bills which have passed the houses become laws when signed by the speakers, and not until then, it would seem to be giving them a retroactive effect, to make them relate to the day of their passing the houses. In New York every law, unless a different time be prescribed therein, takes effect throughout the State on, and not before, the 20th day after its final passage. 1 Kent's Com., 454, 3d ed. This, or some similar rule, ought to be adopted in every State in the Union. See 1 Gallison, 62, case of the Brig. Ann; 1 Kent's Com., 454, 3d ed.; Dwarris on Statutes, 682, et seq."

Description of Act in Journal Entries—Conference Committee—Construction of Report—When Statute Takes Effect.—The question here was the validity of the Act of February 8, 1870, ch. 55, passed when the Constitution of 1834 was in force. The sections of that instrument construed were art. 2, secs. 17, 18, and 21. L. LEHMAN, Sp. J., held: "It is not essential to the validity of a statute that it should be described in the journal entries recording its passage by setting out its title *in ipsissimis verbis*. Discrepancies between such journal entries and the title of act are treated as mere abbreviations or omissions, which are supplied by presumption or disregarded as immaterial. . . . A discrepancy between the act as passed and the journal entries recording its passage, as to the number of sections contained in the act, does not affect its validity. This is not a material matter, but, if it were, the act and not the recital of the journal entries would be conclusively presumed to speak the truth. . . . A bill having been passed regularly by both houses was referred, upon a difference between the two houses as to certain proposed amendments, to a joint committee of conference. This committee reported as follows: 'Your committee of conference, to whom was referred Senate Bill No. 10, with house amendments, beg leave to report the accompanying bill in lieu of said bill and amendments, in which is embraced substantially all the provisions of both houses. Your committee deem it prudent to propose a bill in lieu, as the original bill has been much disfigured by amendments, interlineations, and erasures. Your committee ask that the bill offered be accepted and passed.' This re-drafted bill of the committee of conference contained fewer sections and omitted some of the proposed amendments—the committee substituting compromise provisions therefor. The committee's report was concurred in by the houses, and the bill signed. The bill was not passed after its re-drafting by the committee. . . . When a bill is signed by the speakers of the two houses, it then takes effect by relation as of date of its passage.[1] It is not required that a bill shall be enrolled before its signing, and therefore the recital of the date of its enrollment on the journals affords no evidence that the bill has not been signed at that date." Judge TURNEY dissented. **91**, 596. *Nelson v. Haywood County.* 1892.

Bills Containing Same Substance, Etc.

Passage of Laws at Extra Session Previously Rejected at Regular Session—Meaning of "Session."—The act considered was that of 1890 (extra session), ch. 33. CALDWELL, J.: "The act assailed was passed at an *extra session*. A bill, in substance the same, had been passed by the house of representatives and rejected by the senate at the *regular session*. Therefore it is alleged in the bill, and insisted in argument, that

[1] See Dyer *v.* The State in note to Hill *v.* The State, preceding page.

it was not a competent subject for legislation at the extra session, though embraced in the governor's proclamation for an extra session as required by sec. 9 of art. 3, of the Constitution. The position is that the power of that general assembly—that particular body of representatives and senators—to legislate upon that subject was exhausted by the action taken at the regular session, and that the proclamation of the governor could not restore that power. If it be true, as assumed, that the general assembly exhausts its constitutional power of legislation on a given subject for the full term of two years, by the rejection of a bill at the regular session, then it is manifest that the governor can not revive that power, and make it effective for an extra session; but that legislative power may be exhausted in that way, and to that extent, we do not admit. The language of the Constitution applicable to the case is as follows: 'After a bill has been rejected, no bill containing the same substance shall be passed into a law during the *same session.*' Art. 2, sec. 19. 'Session,' as here used, means a particular sitting of the general assembly; as, a *regular* sitting for the transaction of general legislative business, or an *extra* sitting for the transaction of special legislative business named in the governor's proclamation. It is the space of time between the first meeting and the final adjournment of each particular sitting or term.

"The Constitution virtually so defines the word. It provides for different sittings, and calls each of them a 'session.' 'But no member shall be paid for more than seventy-five days of a *regular session*, or for more than twenty days of an *extra or called session*,' etc. Art. 2, sec. 23." 89, 488. [1]*Williams v. Nashville.* 1891.

ART. 2, SEC. 22. The doors of each house and of committees of the whole shall be kept open, unless when business shall be such as ought to be kept secret. [Same as Const. 1834, art. 2, sec. 22; Const. 1796, art. 1, sec. 19.]

ART. 2, SEC. 23. The sum of four dollars per day, and four dollars for every twenty-five miles traveling to and from the seat of government, shall be allowed to the members of each general assembly elected after the ratification of this Constitution, as a compensation for their services. But no member shall be paid for more than seventy-five days of a regular session, or for more than twenty days of any extra or called session; or for any day when absent from his seat in the legislature unless physically unable to attend. The senators, when sitting as a court of impeachment, shall each receive four dollars per day of actual attendance.[2]

[Const. 1834, art. 2, sec. 23. "The sum of four dollars per day, and four dollars for every twenty-five miles traveling to and from the seat of government, shall be allowed to the members of the first general assembly as a compensation for their services; the compensation of the members of the succeeding legislature shall be ascertained by law; but no law increasing the compensation of the members shall take effect until the commencement of the next regular session after such law shall have been enacted."]

[Const. 1796, art. 1, sec. 20. "The legislature of this State shall not allow the following officers of government greater annual salaries than as

[1] See same case, art. 1, sec. 8, p. 63; art. 2, sec. 2, p. 255; art. 11, sec. 8.
[2] See Williams *v.* Nashville.

follows: Until the year one thousand eight hundred and four, to wit: the governor not more than $750, the judges of the Supreme courts not more than $600 each, the secretary not more than $400, the treasurer or treasurers not more than four per cent for receiving and paying out all moneys, the attorney or attorneys for the State shall receive a compensation for their services not exceeding $50 for each Superior court which he shall attend. No member of the legislature shall receive more than $1.75 per day, nor more for every twenty-five miles he shall travel in going to and returning from the general assembly."]

ART. 2, SEC. 24. (No money shall be drawn from the treasury but in consequence of appropriations made by law); and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at the rise of each stated session of the general assembly. [Same as Const. 1834, art. 2, sec. 24. Const. 1796, art. 1, sec. 21, had only words in parenthesis.]

ART. 2, SEC. 25. No person who heretofore hath been, or may hereafter be, a collector or holder of public moneys, shall have a seat in either house of the general assembly, or hold any other office under the State government until such person shall have accounted for and paid into the treasury all sums for which he may be accountable or liable.[1] [Same as Const. 1834, art. 2, sec. 25. Const. 1796, art. 1, sec 22, did not contain the words, "or hold any other office under the State government," but was otherwise the same.]

ART. 2, SEC. 26. No judge of any court of law or equity, secretary of State, attorney-general, register, clerk of any court of record, or person holding any office under the authority of the United States, shall have a seat in the general assembly, nor shall any person in this State hold more than one lucrative office at the same time; Provided, That no appointment in the militia or to the office of justice of the peace shall be considered a lucrative office (or operate as a disqualification to a seat in either house of the general assembly). [Same as Const. 1834, art. 2, sec. 26. Const. 1796, art. 1, sec. 23, did not contain words in parenthesis, but was otherwise the same.]

ART. 2, SEC. 27. Any member of either house of the general assembly shall have liberty to dissent from and protest against any act or resolve which he may think injurious to the public or to any individual, and to have the reasons for his dissent entered on the journals. [Same as Const. 1834, art. 2, sec. 27; Const. 1796, art. 1, sec. 25.]

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[1] See **71**, 180, and T. & S. 748.

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ART. 2, SEC. 28. All property, real, personal, or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except $1,000 worth of personal property in the hands of each taxpayer, and the direct products of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property. The legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State, over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State.[1]

[Const. 1834, art. 2, sec. 28. "All lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, slaves between the ages of twelve and fifty years, and such other property as the legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. A tax on white polls shall be laid in such manner and of such an amount as may be prescribed by law."]

[Const. 1796, art. 1, sec. 26. "All lands liable to taxation in this State held by deed, grant or entry, shall be taxed equal and uniform, in such manner that no one hundred acres shall be taxed higher than another, except town lots, which shall not be taxed higher than two hundred acres of land each. No freeman shall be taxed higher than one hundred acres, and no slave higher than two hundred acres on each poll."]

Power to Impose and Collect Taxes.

Power of Taxation Impliedly Reserved in All Grants of Realty.—TURNEY, J.: "Taxes are an incident to eminent domain, or ultimate dominion of the State over the subject of property. The power of taxation is impliedly reserved in all grants of realty, and expressly delegated by the Constitution. The right of the State to collect taxes follows real property inherently into whosesoever hands it may go; no judgment or attachment can have priority over it. When land is sold by constraint of law, as in this case, the purchaser becomes a debtor to the sovereign for the taxes; that is, he takes the property thus encumbered, and while he may collect of the party, as whose property the land was sold, he can not abate the price agreed to be paid for the benefit of creditors by unpaid taxes." **56**, 585. *Staunton v. Harris.* 1872.

[1] For indirect or unimportant references to this section, see **32**, 357; **82**, 45; **85**, 451; **87**, 234; **91**, 559.

Enforcing Payment of Taxes by Penalty.—NICHOLSON, J.: "The power to annex penalties for the enforcement of the taxes assessed is necessarily involved in the power to collect and impose taxes for public purposes. Without taxes government can not exist. Hence, the power to tax is a necessity for self-preservation. But the power to impose taxes without the power to insure their prompt collection would leave the government liable to be embarrassed in its operations by the delinquencies of tax payers. It follows that the legislature must have the discretion as to the mode of insuring prompt collections; this is as much a necessity as the power to tax. A penalty annexed to the failure to pay may be properly adopted, both as a means of inducing tax payers to be prompt and as a means of protecting the State against loss by such failure to be prompt in payment.

"But it is said the Constitution requires taxes to be so imposed that they shall be equal and uniform throughout the State; and that this provision is violated by annexing a penalty, whereby some pay more taxes than others on property of the same value. The taxes imposed are equal and uniform, as required, and the amounts required to be paid are uniform, as near as such a thing is practicable. Every tax payer has the right to discharge his liability to the State by paying the amount assessed. If he fails to discharge his duty as prescribed by law, he thereby incurs the penalty, the additional amount he has to pay is not an additional tax imposed upon his property, but an amount imposed as a punishment for failure to discharge his duty as a taxpayer. He does not pay more than his neighbor, who has been prompt, because he was taxed more than that neighbor, but because he has violated his duty. The taxes imposed are equal and uniform, notwithstanding some may incur the penalty, and thereby pay more than others." 55, 563. [1]*Myers v. Park.* 1875.

Exemptions.

Of Educational Institution.—DEADERICK, J., held: "So much of the Act of February 3, 1869, as undertook to exempt property of Ward from taxation is unconstitutional. The Act of 1882 exempted from taxation property used for purposes purely educational, and included property belonging to private persons used for educational purposes. But the Act of 1883 exempted from taxation property belonging to incorporated institutions of learning, and not property belonging to private individuals, though used for educational purposes."[1] 84, 27. *Mayor etc. of Nashville v. Ward.* 1885.

Charitable and Religious Purposes—Secular Use of Property.—WILKES, J., held: "The personal property of an incorporated publishing house, used in conducting its business, is exempt from *ad valorem*

[1] See same case, art. 1, sec. 8, p. 56.

taxation under our Constitution and [1]statutes exempting from taxation property held and used for purposes 'purely' or 'exclusively' religious, charitable, scientific, literary, or educational, where the corporation was placed by its charter under complete control of an unincorporated religious society or denomination, whose discipline provided that the entire net income arising from the business of the corporation, consisting mainly of the publication and distribution of religious literature, should be applied exclusively to the benefit of the traveling, supernumerary, superannuated, and worn-out preachers of such religious denomination, their wives, widows, and children. . . . But this exemption does not attach to property not separable in its use, *e. g.*, the outfit of a publishing house, if it has been diverted to secular purposes to any material extent, *e. g.*, the one-fifty-sixth part of its use. . . . But this exemption is not defeated by the use of the property, viz.: The outfit of the publishing house, in printing in part secular books, etc., if the entire net proceeds of the business is applied to the religious and charitable purposes provided in the charter and discipline." Judge SNODGRASS dissented. **92**, 188. *M. E. Church South v. Hinton.* 1893.

Exemption of $1,000.—The act under consideration was that of 1891 (ex. ses.), ch. 26, sec. 1, sub-sec. 6. CALDWELL, J., held: "Each citizen, whether a married woman or other person, owning taxable personal property is entitled to exemption out of same to the extent of $1,000 from State, county and municipal taxation." **93**, 210. *Bank v. Morristown.* 1893.

Realty and Personalty—"According to Value"—"Equal and Uniform."

Determining Value—Limitations and Restrictions.—CARUTHERS, J., held: "By the Constitution, art. 2, secs. 28, 29, all property shall be taxed according to its value. There are no other limitations or restrictions in the Constitution upon the power of the legislature. . . . All property should be assessed at its fair value, to be determined by the ordinary selling and buying prices for cash at the time the assessment takes effect. To place it any lower than this standard is a palpable dereliction of duty by the assessors and an infringement upon their oath."[2] **40**, 696. *Brown v. Green.* 1859.

"Taxation"—"Local Assessment"—Meaning of These Terms.—In this case FREEMAN, J., discusses at length several decisions of other courts, and many eminent authorities, and says: "We proceed to examine the proposition thus maintained, and the one most relied on by counsel for complainant. He insists that *taxation* applies, as in the

[1] Acts 1889, ch. 96, sec. 2, sub-sec. 2.

[2] Code 1858, sec. 563, sub-sec. 3, relating to taxation of slaves.

cases cited, and many others not cited, alone to revenues to be collected from the people for general and ordinary purposes of government, and this form of taxation is subject to the restrictions contained in sec. 28, art. 2, of our Constitution; but that, on the contrary, *taxation in the form of local assessment*, is not thus regulated and restricted, and is equally lawful and constitutional, or within the province of the legislature to authorize. This last mode of taxation, he concedes, is subject to some necessary limitations, one of which is, it must be apportioned. If, however, the Constitution does not regulate this mode of taxation, either by express limitation or by fair implication, from its general provisions, it is difficult to see where a State legislature would find the limitations that would operate as a restraint upon a body which, it is maintained, is as omnipotent as the British parliament in all matters legitimately legislative, that is in all matters involving law-making, and the regulation of the *future* conduct and rights of the citizen.

"However, we proceed to examine the question thus presented. We assume as sound the principle laid down by Chief Justice Ramsey in the case cited above, which is substantially that the Constitution intended to provide, in art. 2, sec. 28, for regulation and limitation upon the powers of the government of the State in the collection of taxes from the people, and that this mode thus provided being sufficient for all the purposes of government, that if the Constitution contains nothing more on the subject, 'any other mode of levying taxes for any purpose was necessarily excluded'—the clear expression of one thing excluding another. As to taxation for State purposes, we take it that it will be conceded that all taxation, fastened upon the people by the legislature, must, of necessity, be governed by this clause of our Constitution. We ask why such must be the rule? The answer must be, that it can not be presumed that the convention, in fixing these regulations and limitations upon the taxing power, intended only to regulate one-half of it, so to speak, and leave another portion, that might be rendered equally burdensome upon the people, without restriction or limitation, to be exercised at the will of the legislature. They have provided regulations, and fixed the limitations upon the mode of exercising the *taxing* power, and it must be that unless they had expressed otherwise, the whole subject is included. They have said '*all property shall be taxed according to its value.*' This excludes the power of taxing on any other principle for State purposes.

"But on the theory of the argument in favor of the proposition sustaining this tax now under discussion, why may not the principle of *local assessment* be applied to raising revenue for many of the burdens that now rest on the State? Much of the debt of the State was incurred for aid to the several railroads and turnpikes of the State. Why not adopt the mode of *local assessment* on the people of the counties

through which these roads run, and apportion the burden on the people most benefited? If the Constitution only regulates taxation when applied to raising revenue for the general purposes of government, why may not the limitations upon the exercise of the taxing power be avoided at any time?—for all the class of cases referred to (and perhaps others), that may well be denominated *local improvements* by simply changing the mode of laying the burden on the people, and calling it by the name of '*local assessment*,' and then we have but to apply the one mode to the one class, and the *constitutional mode* to the other class, to find the government raising revenue from the people in the one case in a mode subject to no limitation whatever, and in the other regulated by the *Constitution*, and that for precisely the same character of purposes. In other words, that the power of taxation is only subject to the Constitution when the legislature choose that it shall be." **56**, 365. [1]*Taylor, McBean & Co. v. Chandler et al.* 1872.

Value at Time of Assessment.—The Act of March 27, 1883, which conferred upon the Chancery court power to reduce taxes assessed in Memphis before the charter of that city was repealed "when it shall appear that such assessments are excessive in view of the present value of said property," was declared unconstitutional in this case. DEADERICK, J., said: "Our Constitution requires all property to be taxed according to its value, that value to be ascertained in such manner as the legislature may direct, so that taxes shall be equal and uniform throughout the State. Undoubtedly these fundamental principles of taxation are intended to apply to the time at which such taxes are assessed, so that the property taxed shall be so taxed at this value at the time at which the tax is imposed; and also the equality and uniformity of taxation required are equality and uniformity with taxes on property of like character imposed at or about the same time. Nor do these requirements present any impediment to providing agencies to reduce assessments which were, at the time they were imposed, excessive and unequal. But it is not competent for the legislature to prescribe a rule for the reduction of assessments which will violate the manifest object of the fundamental law. That object is that the property must be taxed at its value at the time the tax is imposed." **79**, 413. *State for use etc. v. Butler et al.* 1883.

Same—Banks and Bank Stock.

Capital Stock—Stock of Stockholders—Difference—Residents and Non-Residents.—GREEN, J.: "Was it the intention of the framers of the Constitution and the legislature of 1836 to impose additional taxation on those corporate institutions which had previously been brought into

[1] See same case, art. 2, sec. 29.

existence, and which had contracted to pay a consideration for the privileges which had been granted them? We are clearly of opinion that they did not. The twenty-eighth section of the second article of the Constitution, which is the one under consideration, in enumerating the different kinds of property which shall be made liable to taxation, mentions bank stock, but not the capital stock of the bank. It can scarcely be necessary to say that by bank stock is meant individual interest in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the bank on hand at the expiration of the charter, and that the capital stock of the bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation to be used and managed in trust for the benefit of the members. This clause of our Constitution does not direct that the capital stock of any corporation shall he taxed, but has left it to the discretion of the legislature. This brings us to an examination of the Act of 1836, chs. 13, 14, which, it has been contended, does tax the capital stock of the Union Bank of Tennessee. The first section of chapter 13, in enumerating the different kinds of property which shall be liable to taxation, mentions bank stock other than such as may be exempted from taxation as thereinafter provided for, and subjects it, in common with every other description of property, to an assessment of five cents on every one hundred dollars. The capital stock of a bank is not here enumerated, and the second section of the same statute shows conclusively that the legislature had a very distinct conception of the difference between bank stock and the capital stock of the bank, for it provides, among other things, 'that all stocks owned by the State, or by literary, religious, or charitable institutions, and all capital stock of all such incorporated companies as had theretofore been, or might thereafter be, exempted from taxation in their respective charters of incorporation, shall be exempted from the payment of every State, county, or other tax. Not satisfied with not having taxed the capital stock of the banks in the first section of the statute, it seems that, out of an abundance of caution, they expressly exempt it therefrom by the second section, provided it be exempted in their charters of incorporation.

"Manifestly the framer of this statute must have had in his mind, when he drew this section, the rights of those corporate institutions which had previously contracted with the State to pay one-half of one per cent on their capital stock as a consideration for the privileges granted them, and believed it to amount to an exemption from taxation. The fifth section of the Act of 1836, ch. 14, after providing that all property taxable by law shall be given in to commissioners at its cash value, further provides that the revenue arising on bank stock shall be collected from the bank on the amount of stock paid into the vaults by the several stockholders in said bank or banks, and it shall be

the duty of the cashier to list the amount of stock owned in his or their bank by the several individual stockholders. Was it intended by this section to tax the capital stock of the bank? Surely not. The subject-matter, again, is bank stock, and not the capital stock of the bank. If it had been intended to tax the bank, why require the cashier to list the amount of stock owned by the several individual stockholders? A mere statement of the capital stock paid in would have been amply sufficient for the purpose of ascertaining the amount of revenue to be raised therefrom, and might have avoided some perplexity and trouble. If a tax on the bank was meant by this section, why wish to know who the stockholders were? The knowledge could furnish no additional facility in collecting the revenue from the bank.

"We are satisfied that a tax upon the bank was not intended, but that an individual tax on the owners of the stock of the bank was; that the legislature believed that they had the power to tax all the stock as well as that owned by non-residents as by our own citizens, and that they could compel the bank to pay the tax out of the dividends semi-annually declared, without which the tax intended to be laid on non-resident stockholders could not be collected. This brings us to the third and last inquiry, which is, how far the provisions of this fifth section of the Act of 1836, ch. 14, can be enforced against the owners of bank stocks of this State. It is not contended that the State does not possess the power to tax resident holders of bank stock, or stocks of any other description, but, to do this constitutionally it must be given in, like other property, at its cash value, not what it might have originally cost, for stocks fluctuate in value like all other property, and what cost one hundred dollars today may not tomorrow be worth fifty. . . . The fifth section of the Act of 1836, ch. 14, on which we are commenting, makes provision for the listing of every species of property for taxation, except bank stock, at its cash valuation. But bank stock is to be estimated at what was given for it originally at bank, to wit: in the case of owners of stock in the Union Bank at one hundred dollars a share. This, we think, is in violation of" (this section); "it may and will produce inequality. Bank stock is scarcely ever at par, it being generally above or below, and, unless it be given in for taxation at its real cash value, one species of property will be taxed higher than another species of equal value."[1] **17**, 499. *Union Bank v. The State.* 1836.

Equal Taxation—Exemptions by State—National Bank Stock—Power of Taxation in State.—McFarland, J., held: "The proviso of the Act of Congress of Feb. 10, 1868, that the taxation upon the shares of national banks shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, does not prevent a

[1] What the court said with reference to taxation of non-resident stockholders was overruled by Nashville *v.* Thomas, art. 2, sec. 29, and is here omitted.

State which exempts from taxation certain forms of moneyed capital, from taxing shares of stock in national banks."

In discussing the question, he said: "The Constitution of this State in force at the time these acts were passed, provided: (quoting second and third clauses). Yet it has never been held that this provision was violated by the exemptions in question, or others of a like character. When the right of the legislature is conceded to make exemptions, it would seem that that body must be the judge of the policy or propriety of the exemptions made. We do not say, however, that these might not be carried to a point beyond this power. What, however, would be the result should the legislature see proper to exempt property from taxation in violation of the spirit of the Constitution above quoted, we do not say. Would it result that all the tax imposed by the act upon other property would therefore be illegal, and not susceptible of collection? This would be to give an unusual effect to an unconstitutional law; that because certain property is improperly exempted, therefore no tax can be collected from other property that is properly taxed. Would not a more reasonable view be that the part of the law providing for the improper exemption should be declared void?

"If the argument be sound that the exemption of these bonds was a violation of the condition in the act of congress upon which the right to tax national bank stock is founded, it would seem to follow that the exemption is also in violation of that part of our State Constitution above quoted, requiring equal taxation; and if this be true, then it would result that the exemption was in violation of the Constitution, and should have been disregarded altogether. And this would certainly be more rational than to defeat the entire tax law because of the fact that a part of it is unconstitutional.

"We are of opinion that the true construction of this act of congress is that the State legislatures shall not have power to tax the national bank stocks at a higher rate than is imposed upon the moneyed capital in the hands of its individual citizens by the general tax law, but that this does not prohibit the State from making such exemptions as its civil policy may demand, within the power of its own Constitution; for the act of congress was certainly enacted with regard to this power of the State legislatures." 54, 389. [1]*McLaughlin v. Chadwell Coll'r et al.* 1872.

Doctrines Previously Announced Reaffirmed.—In this case GEORGE GILLHAM, Sp. J., reaffirmed the doctrine that taxation of capital stock to the corporation and of the shares of stock to its stockholders is not double taxation. Capital stock and shares of stock are separate and distinct property interests, and form separate and distinct subjects of taxation. 95, 226. [2]*The State v. Bank of Commerce.* 1895.

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[1] See same case, art. 2, sec. 29.

[2] See same case, art. 1, sec. 20, p 195; art. 11, sec. 8.

Same—Railroads.

Taxation of Corporations Exempt by Charter, by Amending Charter.—McFARLAND, J.: "The provisions of the first ten sections of the Act of March 24, 1875, provide for ascertaining the value, as required by the Constitution, to the end that it be taxed according to its value. The eleventh section does not purport to ascertain the value, but to substitute a fixed tax upon the income, as an amendment to the charter for ten years; and a conclusive argument against this being a compliance with the Constitution as to equity in taxation is, that the rate fixed, one and a half per cent on the gross receipts, is to remain the fixed rate, as part of the charter, for ten years, no matter how the rate of taxation as to other property may be increased by the public exigencies. But it is said this provision is valid as an amendment to the defendant's charter, and that the legislature had the undoubted right to provide for the amendment of charters, and as it was competent in the original grant of the charter to exempt the property from taxation, or to stipulate for a fixed sum in lieu of taxation, that the same might be done by an amendment; that the power of the legislature in this regard was not changed by the Constitution of 1870. How this might be when an amendment is granted stipulating for a special tax in consideration of some right released by the corporation, it is sufficient in this case to say that the eleventh section of the Act of March, 1875, while it purports to offer an amendment to the charter of the several railroads, in reality does no more in respect to roads having or claiming no more exemption than to give to them their election as to which of two modes of taxation they will submit to. It amends the charter in no other respects; it provides for nothing except for the taxation of such companies. As to these railroad companies whose property was exempt from taxation, or claimed to be, so that they could not be taxed except they voluntarily assent thereto by accepting an amendment to their charter upon this consideration, the question would be presented in a different aspect, and as to this I express no opinion. But where no exemption was claimed it was simply offering to this class of property holders the right to elect which of two modes of taxation they would adopt, one the mode required by the Constitution, the other entirely different; attempting to do indirectly what could not be done directly, the eleventh section, as to this class of roads, acquiring no additional validity by calling it an amendment to the charter. It is, in reality, nothing but a tax law. The fact that this defendant owns other roads in the State which are claimed to have been exempt from taxation, and which exemption, it was claimed, was relinquished by accepting the provisions of the eleventh section, can, I think, make no difference. Those other roads were constructed under different charters, and are governed by different rights. Accepting an amendment in respect to

these roads would furnish no sufficient ground to release this property, which is admitted to have had no exemption."[1] 67, 531. *Ellis v. L. & N. R. R. Co.* 1876.

Assessing All Railroad Property at Aggregate Valuation — Railroad Assessment Act of 1875, Void — Opinion Overruled in L. & N. R. R. Co. v. The State.—FREEMAN, J., held: "The meaning of the Constitution, art. 2, secs. 28–9 is, that all property must be assessed upon the same principle; all assessments must be made by the same rule; the basis of valuation must be uniform, and all property assessed at all must be assessed at its real value. By the Act of March 20, 1875, all the property of a railroad company, houses and lands, personalty and realty, track and rolling stock, goes into a general aggregate valuation, without any attempt to fix the value of each piece or species of property. This aggregate value is divided by the number of miles in the road, and the value per mile, thus obtained, is multiplied by the number of miles lying inside a county or municipal corporation, and this product is the amount subject to county or municipal taxation. By the uniform practice of this State, since the Constitution of 1834, the property of private citizens is assessed at so much for each article or species of property—personalty and realty are separately assessed. There must not be one rule for railroad companies and another for private citizens. The assessment of the property of both must be governed by the same principle. The act fixes an arbitrary standard of valuation for the property of railroad companies different from that by which the property of individuals is assessed. It practically prohibits counties and municipal corporations from taxing the real property of the company, lying inside their limits, as their actual value. This act is unconstitutional and void. . . . The act provides, 'from the aggregate value is to be deducted the real cash value of individual shares.' The constitutional mandate that 'all property shall be taxed,' prevents the legislature from granting any exemption whatsoever, no matter what the consideration. The grant of the exemption is unconstitutional and void. . . .

"It is proper to say that in this opinion we have not reasoned or concluded in accord with the argument and opinion of Judge Sneed, in the case of the Louisville & Nashville Railroad Co. *v.* The State, 8 Heis., 663. That opinion is not one by which we feel bound as authority on this question, as the court, then consisting of six judges, was equally divided on the main question — never agreed on that — and the opinion was only delivered, under provisions of a statute requiring an affirmance of the judgment below, on an equal division between the members of the court; nor was the question of the mode of assessment so

[1] See Third Tenn. Chc'y Reports, p. 480.

elaborately discussed in that case before the court—that case having arisen in 1874, when we had no such law as that of 1875. This statute was afterwards held unconstitutional,[1] and the opinion is, therefore, not one legally binding. For this reason, we feel less hesitancy in overruling, or rather disregarding and differing with the reasoning and argument of the learned judge who delivered that opinion, as we have done in this opinion. We are satisfied with the correctness of our conclusions on this question, and therefore hold the mode of taxation in the particulars mentioned, in violation of the Constitution and the law, in the matters discussed, void." 75, 561. *Mayor etc. of Chattanooga v. N., C. & St. L. R. R. Co.* 1881.

Exemption Clause in Charter—Railroad Assessment Acts—Part Valid and Part Invalid.—The Act of 1875, ch. 78, sec. 10, was declared unconstitutional in the case of Ellis *v.* L. & N. R. R. Co., p. 318. And the eleventh section of the same act was declared unconstitutional in M. & C. R. R. Co. *v.* Gaines, art. 11, sec. 8. By the Act of 1877, ch. 19, the Act of 1875 was amended, and in Mayor etc. of Chattanooga *v.* N. C. & St. L. R. R. Co. *supra*, this amendment was declared unconstitutional, as was also the provision in the Act of 1875, "directing the tax assessors to deduct from the aggregate value of the property of each company the cash value of the individual shares of the shareholders. . . . That provision was intended to be repealed by the sixth section of the Act of 1877." Another amendment was made by the Acts of 1877, ch. 19, sec. 13, and by the Acts of 1881, ch. 104, and 1882, ch. 16. "The latter act was passed to meet the objection to the Acts of 1875 and 1877, pointed out by the decision in the case of the City of Chattanooga *v.* Railroad Company, that they practically prohibited counties and municipal corporations from taxing the real property of the company lying inside their limits at their actual value."

COOPER, J.: "The eleventh section of the Act of 1875 has been, as we have seen, declared to be unconstitutional and void. So part of the exemption or deduction clause of the third section of that act, which part was, however, repealed by the Act of 1877. So, of so much of the Act of 1877 as prohibited municipal corporations from having the benefit of the value of the property within its limits, the tenth section of the Act of 1875 expressly giving to such corporations the benefit of the valuation of such property. And the question is, whether the unconstitutionality of these parts of the acts mentioned avoids them *in toto*? A part of a statute may be unconstitutional and void, and the residue valid. Tillman *v.* Cocke. It is only where the residue is so dependent upon and connected with the void part that it cannot be presumed the legislature would have passed the one without the other, that the whole

[1] Perkins *v.* Scales, art. 2, sec. 2, p. 250.

statute is void. Neely *v.* State. The eleventh section of the Act of 1875 was an entirely independent provision from the residue of that act, for it simply proposed to exempt from the taxation contemplated such companies as would accept an amendment of their charters embodying certain conditions. If no company accepted the proposition, or if the acceptance was invalid by reason of the unconstitutionality of the proposition, the residue of the act, which related exclusively to the assessment and taxation, would remain in full force. So, the exemption or deduction clause might be invalid or be repealed without affecting an assessment from which no such deduction was made. And the unconstitutionality of the prohibitory clauses of the Act of 1877 left the unexceptionable provisions of the Act of 1875 in full force. The fact, therefore, that these parts of the statutes have been declared void would not affect the residue of these acts if valid."[1] 80, 522. *Franklin County v. N. C. & St. L. R. R. Co.* 1883.

Tax on Corporate Property and Shares of Stock Not Double Taxation.—The question was the validity of the Act of 1887, ch. 2, sec. 8. LURTON, J., held: "A statute neither imposes double taxation nor violates the constitutional mandate that 'all property shall be taxed according to value,' which requires corporations to pay tax upon the value of their property, and their stockholders also upon the value of their shares." 87, 415. [2]*Street R. R. Co. v. Morrow.* 1889.

Telegraph Lines Taxable as Other Property.—FREEMAN, J., held: "Telegraph lines are considered as partaking of the nature of realty, in analogy to the new doctrine that railroads and rolling stock are so treated, and consequently under the [3]Act of March 24, 1875, such property is held by the court liable to State and county tax." Judge MCFARLAND dissented. 68, 509. *W. U. Tel. Co. v. The State and Sumner County.* 1877.

Privilege Taxes.

Privilege—Sense in Which this Term is Used in Art. 11, Sec. 8—Jacks and Stallions.—REESE, J.: "As a portion of the taxes due in the case before us was from the keepers of stallions and jacks, and the exhibitors of shows, it is contended that so much is unconstitutional. The Act of 1835, ch. 15, sec. 4, prohibits in general the keeping of those animals for profit in the propagation of stock, and the exhibitions of shows, but concedes the privilege of doing so to all those who shall apply for a license and pay for the privilege the amount specified in the act. The Constitution in express terms confers upon the legislature the power to tax privileges. But it is contended that the avocations in question are not in themselves, and in their nature, privileges. They

[1] M. & V., 669 et seq. [2] See same case, p. 331; also p. 154. [3] M. & V., 709.

are not so, indeed, unless prohibited in general by the law; but, when so prohibited, the license or permission to pursue them becomes a privilege, and the subject of the taxing power of the legislature. The seventh section of the eleventh article, which prohibits the legislature from granting privileges, immunities, . . . shows the sense in which the convention use the term. It is the license or permission, upon the specified terms, to do that which in general is prohibited. Such license or permission, as has been said, becomes a privilege and the subject of taxation. But it is said that to concede to the legislature unlimited power to prohibit particular pursuits and avocations in themselves indifferent or useful, and then to license them on specified terms, and tax the privilege, might make the pursuit of farming itself a subject of taxation. The danger is somewhat remote of the indiscreet exercise of such a power, but, if it were to occur, the corrective would have to be applied by the people themselves in the exercise of their elective franchise." **20**, 98. *Mabry v. Tarver.* 1839.

Standing Jacks — Privilege is of Legislative Creation — Penalties — Implied Repeals. —CARUTHERS, J.: "This was an action of debt, for $250, instituted by Attorney General Bridges, in the Circuit court of McMinn, in the name of the State of Tennessee, against Elijah Cate, for standing a jack for mares, for the year 1853, without taking out a license for the privilege, according to the Act of 1835, ch. 13, sec. 4 (C. & N., 603). The main ground of defense is that the Act of 1835 is repealed, by implication, by the Act of 1848, ch. 161, sec. 23. . . . In 1835, doubts were entertained as to the power to impose any other than an *ad valorem* tax upon this kind of property; and, regarding it in that light, it would fall under the restriction contained in the twenty-eighth section of the second article of the Constitution, which prohibits any 'one species of property, from which a tax may be collected,' from being 'taxed higher than any other species of property of equal value.' But, by the next clause, power is given to the legislature 'to tax merchants, peddlers and privileges, in such manner as they may, from time to time, direct.' This kind of property being generally more productive than any other of the same value, it was not thought to be just or equal that it should only be subject to an *ad valorem* tax. To avoid this difficulty, it became necessary to constitute it a privilege, and to tax it as such. A privilege, in this sense, is that which can not be enjoyed without legal authority, which is generally evidenced by license. They are of legislative creation, and, when exercised without license or authority, are generally visited with penalties upon the offenders. . . . There can be no doubt, then, of the liability of the defendant to this penalty, unless this law has been repealed, as is contended, by the Act of 1848, ch. 161, secs. 23–25, p. 267. There is no express repeal, but it is insisted it so operates by implication. If the two acts can not stand

together, the former must give way to the latter. Such must be the effect, if their provisions are inconsistent. But if they can both have effect and are not incompatible with each other, an implied repeal does not take place, and we must give operation to both. . . . This act does not change the substantial provisions of that of 1835. There may be some difference in the amount of the tax, but that can have no effect upon the penalty when nothing is paid, and the law infringed by failing to obtain license." **35**, 121. *Cate v. The State.* 1855.

Wholesale Grocers or Merchants Liable for this Tax—Privilege Defined—Act of 1851, Ch. 117, Sec. 5.—CARUTHERS, J.: "By the Act of 1851–2 the County courts are required to levy a tax on property and privileges to meet the interest on any bonds to be issued for stock in said railroads. Now, the only question before us is, whether the occupation or trade of wholesale grocers or merchants is a 'privilege?' If not, it seems to be admitted that there was no power in the County court to levy a tax upon them for this purpose. We cannot suppose that it was intended by the legislature to exclude them, but still they are excluded unless the power is communicated by the act. The Constitution . . . designates the subjects of taxation. It embraces all property and polls, and prescribes the rules by which the tax shall be levied on property. It shall be according to value, and no one species to be taxed higher than another; and then provides 'that the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct.' This would seem to indicate that the occupations of merchants and peddlers were not embraced by the word 'privilege.' But this conclusion does not necessarily follow, and the question must still depend upon the definition of the term.

"The first legislature, after the formation of the Constitution, acted upon the idea that any occupation which was not open to every citizen, but could only be exercised by a license from some constituted authority, was a privilege. And it is presumed this is a correct definition in this application of the term. Several instances of this will be found in the Revenue Act of 1835–6, and all subsequent acts on that subject. How else could a race track, and some other objects to be found in those acts, be taxed higher than any other property of the same value? It is only upon the idea that, by requiring licenses to be taken out, they became 'privileges.' According to the Constitution, privileges may certainly be taxed as such, and not as property; and, as we are authorized by repeated legislative recognition to define the word as above stated, the only question is, whether the occupation of a 'wholesale grocer' could be legally exercised without license. If not, and it certainly can not, it is a 'privilege,' and subject to be taxed as such, under the Act of 1851–2." **36**, 195. *French v. Baker.* 1856.

Statutory and Judicial Interpretation of this Section of the Constitution of 1834 Recognized by the Convention of 1870 — Privilege Defined — Legislative Power of Taxation. — NICHOLSON, J.: "It is a principle of universal constitutional law that the power to levy and collect taxes is an incident of sovereignty. The Constitution of the State does not confer upon the legislature the power of taxation; it passes under the general designation of 'legislative power.' There is no limitation upon the legislature as to the amount or objects of taxation except that found in the restrictions and prohibitions of the Constitution. That section of the Constitution in which is found the clause under which the tax in question was imposed, first lays down the general prohibition that all property, real, personal and mixed, shall be taxed, but gives to the legislature a discretion as to taxing property held by the State, by counties, cities or towns, etc., and then by way of restriction upon the exercise of the power, proceeds as follows: (Quoting second and third clauses.) This is an absolute and imperative inhibition upon the legislature, requiring them, in taxing property, to provide that it be taxed according to value, but expressly excepting from the inhibition the manner of ascertaining that value. This much is left to the discretion of the legislature, but this discretion is to be so exercised that no one species of property from which a tax is collected shall be taxed higher than any other species of property of the same value. So far the provision is confined expressly to the taxation of property. Then follows the controverted clause: 'But the legislature shall have power to tax merchants, peddlers,' etc. . . . This language would seem at first view to confer upon the legislature the power to tax merchants, peddlers and privileges. Its true object, however, was to indicate with distinctness that the power to tax merchants, peddlers and privileges, was not to be understood as inhibited by the restriction as to the taxation of property. Its meaning is, that although in taxing property the legislature is forbidden to tax it except according to its value, yet as to merchants, peddlers and privileges, the legislature is not to be restricted, but may exercise the taxing power without restrictions either as to the amount or as to the manner or mode of exercising the power. The word 'but' is significant of the purpose intended to be accomplished; it indicates that what follows is an exception to that which had gone before, and is not to be controlled by it. The words 'in such manner,' used in this clause, have no other significance than to express with more distinctness and emphasis that the power of the legislature to tax merchants, peddlers and privileges, was unlimited and unrestricted, and might be exercised in any manner and mode in their discretion.

"The first clause has exclusive reference to the taxation of property and in doing this the restriction is that it shall be taxed according to its value. The second clause has reference to the taxation of mer-

chants, peddlers and privileges, and in doing this, the discretion of the legislature, both as to amount and manner of taxing, is clearly recognized. This clause has no reference whatever to the taxation of property—it is confined to the power to tax persons engaged in the business of merchandising and peddling, and those enjoying privileges. It is not imperative upon the legislature, requiring them to tax these occupations or persons, but it is left to the legislature to exercise the power or not, as in their wisdom sound policy may dictate. . . . It is clear, therefore, that from the adoption of the Constitution of 1834, to the adoption of that of 1870, the uniform legislation and judicial construction of the clause under consideration has been, that in assessing taxes on merchants, the legislature had the power to assess any amount at discretion, and in the exercise of this discretion, they could assess a specific amount without regard to the amount of capital, or it could be graduated according to the amount of capital, and the tax so assessed was regarded as a tax on the occupation or privilege, and not upon the goods. In view of these well-known historical facts, it is a reasonable presumption that when the convention of 1870, adopted exactly the same language that had been used in the Constitution of 1834, they adopted it with a full knowledge of the legislative and judicial construction which had been uniformly placed upon the language. But that the convention adopted the construction as well as the language of 1834, is placed beyond all controversy by the clause in the Constitution of 1870, which follows that under consideration. (Quoting clause 5.) With the policy that controlled the convention in adopting either of these clauses we have nothing to do. Our duty is to construe what we find in the Constitution, and to determine whether the legislature has transcended its powers. We find that the Constitution has placed no restriction upon the legislature in the exercise of the power to tax merchants, peddlers, and privileges, and we are bound to presume that their power was thus left unrestricted, under the conviction that the representatives of the people would not abuse the power by unjust or oppressive taxation. Whether this power has been abused or not, in the enactment of the statutes under consideration, is not for us to determine. But it is our province to determine whether the legislature has transcended its constitutional power, and being fully satisfied that they have not, we so declare." **55**, 477. *Jenkins v. Ewin, Clerk.* 1872.

Sense in Which Privilege Clause Was Retained.—NICHOLSON, J.: "The Constitution of 1870 retained the clause as to the taxation of privileges, which was found in the Constitution, and we have held, more than once, that it is to be presumed that the word 'privileges' was adopted and retained in the Constitution of 1870, in the sense in which it was used in the Constitution of 1834, as ascertained and settled by judicial interpretation." **55**, 547. *Wiltze & Pratt v. The State.* 1873.

Merchants' Tax—License Not a Contract.—McFarland, J., held: "Under the provisions of the Constitution of this State, the legislature may classify merchants for purposes of taxation, and tax each class at discretion, except that it can not impose a merchant's tax, usually denominated a license or privilege tax, higher than the *ad valorem* tax on property on that portion of the merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, but may say that the business of a wholesale liquor dealer shall be deemed a privilege, not to be exercised without a license, and the payment of a special tax, in addition to the other taxes imposed upon such dealer as a merchant. . . . If a merchant of one class, paying a tax as such, add to the occupation another though kindred business, which is additionally taxed, his license as a merchant will not exempt him from the payment of the additional tax. . . . A merchant's license under our system is not a contract, and the State may change the rate of taxation pending the period for which it is issued, and the merchant must pay taxes according to the rate fixed by law for any given time." 75, 180. *Kelly v. Dwyer.* 1881.

This Clause Considered in Connection with Art. 11, Sec. 8—Privileges Valid Though Unequal.—Nicholson, J., after quoting from Mayor etc. of Columbia *v.* Guest, the definition of the word "privilege," under the law, said: "Such was the fixed judicial interpretation of the word 'privileges' when the Convention of 1870 adopted exactly the same language in forming the present Constitution. It was adopted with a full knowledge of the meaning which had been attached to it by the courts. This is conclusive as to the present interpretation to be placed on it." The Act of February 24, 1870, ch. 71, sec. 1, constituted the occupation or business of taking photographs, etc., a privilege, and Judge Nicholson continuing, said: "Under the power to tax privileges in such manner as the legislature may from time to time direct, this act is constitutional, unless it is in conflict with art. 11, sec. 8. . . . By the plain and express language of art. 2, sec. 28, the legislature has the power to exercise its discretion as to the mode of taxing privileges. If there is a conflict between this section and sec. 8 of art. 11, it is our duty so to construe them as to make both sections operative. But the first question is, does such conflict exist?

"It can not be maintained that the first clause of sec. 8, art. 11, is violated by the Act of February 24, 1870, ch. 71, because this act does not suspend any general law for the benefit of an individual, nor is it a law for the benefit of individuals inconsistent with the general laws. But it is insisted that the next clause in sec. 8, art. 11, is inconsistent with and restrictive of sec. 28, art. 2, and, therefore, that the Act of February 24, 1870, ch. 71, being in violation of the restrictive section, is unconstitutional. If the premise is correct, the conclusion is legit-

imate. Then the inquiry is, does the Act of February 24, 1870, ch. 71, grant to any individual or individuals rights, privileges, immunities or exemptions other than such as may be, under that act, extended to any other member of the community? . . . As to the policy of the graduation of tax according to the size of the city or town, we have nothing to say. This is a matter left to the discretion of the legislature by art. 2, sec. 28; and we do not think that art. 11, sec. 8, contains any restriction on that discretion which has been violated by the Act of February 24, 1870, ch. 71." 50, 283. *The State v. Schleer.* 1871.

Privilege Tax on Lawyers Invalid — Reasons — Three Departments of State Government — Art. 1, Sec. 9. — In this case each of the judges delivered a lengthy opinion. NICHOLSON, C. J., announced the following as the result of the opinions of the judges: "A majority of the court hold the [1]act taxing the privilege of practicing law to be unconstitutional; two judges, TURNEY and NICHOLSON, holding that the right to practice law is not subject to taxation; two judges, FREEMAN and MCFARLAND, holding that even conceding that the legislature may tax the privilege of a lawyer, the present act is unconstitutional, because it requires a new license to be taken out from the clerk of the County court, and in connection with the previous laws, makes it unlawful to practice without so doing; two judges, DEADERICK and SNEED, holding that the present act is constitutional and valid."

"NICHOLSON, J., in his opinion, said: "When we are called upon to construe that clause in the Constitution which confers upon the legislature the power to tax 'privileges,' in order to ascertain the intention of the framers of the Constitution, we are bound to give such construction as will harmonize with the several provisions which may involve the same question. We not only find the provision that the powers of these departments are 'distinct,' but we find it provided that 'all courts shall be open,' and that 'in all criminal prosecutions the accused hath the right to be heard by himself and his counsel.' It thus appears that the Constitution recognized the lawyer as an essential agent in judicial proceedings. We must presume, therefore, that when the convention provided in the Constitution that the legislature might impose taxes on 'privileges,' they did not intend to recognize in that department of the government the exercise of a power which might involve the judicial department in the legitimate exercise of its distinct powers. If it be true, as held by the majority of the United States Supreme court in the case of Garland *ex parte*, that the right of a lawyer, conferred by the solemn judicial act of the court, is such that he can not be deprived of it at the pleasure of the court or at the command of the legislature; or if, as held by the minority of the court in that case,

[1] Acts 1867-8, ch. 129, sec. 5.

lawyers 'are as essential to the successful working of the courts as the clerks, sheriffs and marshals, and perhaps as the judges themselves;' it is difficult to see how the legislature could impose a tax upon the office or right of the lawyer without thereby involving the very existence of the judicial department. It must be borne in mind that this is simply a question of power as between two co-ordinate and independent departments of the government.

"If the power exists at all, it may be exercised at the discretion of the legislature, by the express language of the Constitution. Hence, although the tax imposed by the present statute may not be so oppressive as to interfere practically with the successful working of the courts, yet if the power be conceded, it is conceding that the legislature possesses a power, which may be exercised, even to the closing of the courts.

"The true safety of the government consists in arresting the first step toward the invasion of one department by another, by the assumption of unconstitutional powers. If the legislature has the power to convert the office of an attorney into a taxable privilege, by prohibiting its exercise without taking out an annual license, why may they not by the same process, convert the offices of the clerks, sheriffs, and marshals, and, in fact, of the judges themselves, into taxable privileges, and require them all to pay taxes on their offices, or cease to hold and exercise their functions?

"In principle no distinction can be drawn. The principle which underlies and sustains our conclusion is the same on which the Supreme court of the United States has uniformly held, that the State can not impose taxes upon the offices, agencies, or instrumentalities of the Federal government. Gobbins *v.* Erie County, 16 Peters, 435. The two governments being supreme and independent in their respective spheres, the Constitution of the United States, which is the supreme law, forbids the invasion by either, of the powers of the other, by imposing taxes on their respective officers or agents. For the same reason, the three departments of the State government, being distinct and independent, in their respective spheres, the Constitution forbids the invasion of the province of one, by the exercise of their respective powers in violation of the powers of the others. Such we hold to be the character of the act of the legislature, which undertakes to impose taxes on the privileges or rights of lawyers, who are officers of the courts, and therefore, we declare the act unconstitutional and void." **55**, 636. *Lawyers' Tax Cases.* 1875.

Sleeping Cars.—COOPER, Chancellor, held: "A privilege tax[1] on the running and using of sleeping cars on railroads in this State, not owned

[1] Acts 1877, ch. 16, sec. 6.

by the railroads, is constitutional and valid, although the owner may be a foreign corporation, and the cars may be used for the accommodation of passengers traveling through the State." Third Tenn. Chc'y. Reports, p. 587; *Pullman Car Co. v. Gaines.* 1877.

Turnpikes — Exemptions — Class Legislation — Charter Construed. — A. D. BRIGHT, Sp. J., held: "The [1]Act of 1891, ch. 25, p. 67, imposing an annual privilege tax of $25 upon 'each tollgate on turnpikes that collect toll for both ways,' is constitutional and valid. The legislature has power to declare the business of running a turnpike for tolls a privilege, and tax it as such. This statute is not vicious class legislation. The classification adopted is not arbitrary or capricious. Substantial distinctions exist, from the taxation point of view, between turnpikes charging 'toll for both ways,' and those charging toll only one way, or not at all. This statute is not invalid upon the ground that it violates the charter contracts of turnpike companies. Corporations take their franchises and privileges, in the absence of explicit contract for exemption, subject to the State's right to impose license or other taxes thereon. Exemptions from taxation are never allowed unless they are granted in 'clear and unmistakable words.' Every doubt and presumption prevails against them. A turnpike company has no exemption from taxation where it is granted, by legislative charter, 'all the rights, powers and privileges' of an existing company whose charter contained an exemption from taxation. Exemption from taxation is not embraced in the terms 'rights, powers and privileges.'" 92, 369. *Turnpike Cases.* 1893.

Inheritance Tax.

Privilege Tax on Right of Inheritance Not in Conflict with this Section, Nor Art. 11, Sec. 8. — The question was the constitutionality of the [2]Act of 1893, ch. 174; ch. 89, sec. 7. WILKES, J., held: "The legislature has constitutional power to impose a privilege tax upon the right of succession, whether by will, inheritance, or otherwise, to the estates of deceased persons. This right of succession is not a natural right, but a mere privilege created by statute, and subject to such conditions and burdens as the legislature may choose to impose for the public benefit. A statute imposing a succession tax upon collateral kindred and strangers, but exempting direct descendants of the decedent from the tax, is valid. The discrimination is based upon just grounds, and the classification is natural and reasonable, not capricious and arbitrary. A statute imposing a succession tax which exempts all estates of less value than $250, is valid. This exemption is based upon sound reason and policy." 94, 674. *The State v. Alston.* 1895.

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[1] Shan. Sup. to M. & V., p. 370

[2] Shan. Sup. to M. & V., p. 79.

Non-Residents.

Distinction Between Provisions of the Constitution that Need No Legislation to Give them Effect and Those that Do — Capital Employed in Purchase of Goods Sold to Non-Residents — History of this Proviso. — SNEED, J.: "The history of this proviso is well known. There was in the Convention of 1870 a very energetic opposition to engrafting upon the new Constitution the clause of the old Constitution which seemed to operate so harshly and invidiously against the commercial community. We refer to that clause which excludes merchants, peddlers and privileges from the protection of the principle of equality. When, however, it was finally adopted, a solemn protest was presented against it by the representatives of large commercial constituencies. And shortly thereafter, the clause now in question was brought forward and adopted. And this was intended as a limitation upon the general power conferred by the Constitution of 1834, and was regarded as a great triumph in behalf of the merchant. Jour. Con. 1870, 301, 369. In the original draft of this clause, it covered only that part of the merchants' capital used in the purchase of goods sold to 'merchants,' and sent beyond the limits of the State. In this original form it was adopted and referred to the committee on revision, who reported it back amended by striking out the word 'merchants' and inserting the words 'non-residents,' so as to make it embrace sales of all kinds, when the goods were to be consumed without the limits of this State, and in this form it became a part of the Constitution, and must be held to apply as well to retail as to wholesale merchants. It seems, however, that there has been no legislation which recognizes this exception. . . . The legislature, in ignoring the exception, has left no express legislative guide to the assessor, and he is thus left to construe the law as he finds it. While it is true, in reference to some provisions of a Constitution, that they are dormant and quiescent until some statute brings them into life and operation, yet there are others which need no legislation to give them effect. They are to be distinguished by such as confer mere discretionary powers upon the legislature, and such as are positive limitations upon the legislative discretion, such as are mandates for legislative action, and such as are inhibitions *per se*. . . .

"The self-executing clause of a Constitution can easily be distinguished, and may be elucidated by various clauses of our Bill of Rights, which are vital and active as they stand, and could not derive any additional vigor from legislation. It may be illustrated, too, in the clauses now in judgment. The legislature by one clause may tax merchants, peddlers and privileges at its discretion, or it may not tax them at all as occupations. But as to capital employed by them, in the purchase of goods sold to non-residents, the legislature can not impose

more than the *ad valorem* tax. This is an inhibition *per se*, and executes itself. The legislature can not violate it by positive enactment, nor can it be ignored or emasculated by the absence of legislative recognition. We hold, therefore, that the imposition of any tax upon that portion of the merchant's capital which is used in the purchase of goods which are sold to non-residents, and taken out of the State, is arbitrary and unlawful, and that the clause of the Constitution which forbids it, executes itself, and must be obeyed with or without appropriate legislation on the subject." 55, 497. *Friedman Bros. v. Mathes.* 1872.

Meaning of the "Non-Resident" Clause of this Section.—McFARLAND, J.: "The provision of the Constitution relied upon means simply that no merchant's tax, that is, the privilege tax upon merchants, shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with the general property tax." 68, 91. *Merchants of Memphis v. City of Memphis.* 1876.

Non-Resident Bondholders Not Taxable.—LURTON, J., held: "Non-resident bondholders are not taxable in this State upon bonds of our domestic corporations held and owned by them. Neither the bondholders nor this property is within the jurisdiction of the State. The Act of 1887, ch. 2, sec. 8, so far as it undertakes to impose such tax upon previously issued bonds, is invalid." 87, 415. [1]*Street Railroad Co. v. Morrow.* 1889.

Interstate Commerce — What is Not Taxation of — Acts 1881, Ch. 96, Sec. 9.—FULLER, C. J., held: "A State legislature may tax trades, professions and occupations in the absence of inhibition in the State Constitution in that regard, and where a resident citizen engages in general business, subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution. A State has power to tax all property having a *situs* within its limits whether employed in interstate commerce or not. A citizen doing a general business at the place of his domicile can not escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. Where complainants took out licenses under the Tennessee law of 1881 to do a general commission business, and gave bond to report their commissions during the year, and to pay the required percentage thereon, they can not, when they apply for similar licenses for the ensuing year, resort to the courts because the municipal

[1] See same case, art. 1, sec. 20, p. 154; also 321.

authorities refuse to issue such licenses without the payment of the stipulated tax." Justice HARLAN dissented. **145** U. S., 1–23. [1]*Ficklen v. Taxing District of Shelby County.* 1892.

By Municipal Corporations—Delegation of Taxing Power—Under this Section of Constitution of 1834, the Legislature Could Create Municipal Corporations with Power to Tax—Case Criticised: Marr v. Enloe.—TURLEY, J: "This case presents the isolated question whether the town of Knoxville, under the provisions of the Act of 1815, ch. 204, its charter of incorporation has the power to levy and collect taxes for municipal purposes. . . . By the second section it is provided that the corporation aforesaid shall have full power and authority to enact and pass laws and ordinances, . . . and to lay and collect taxes for carrying the necessary measures into operation for the benefit of said town. It is not necessary to enter into an argument to prove that it is necessary for the corporate authorities of Knoxville to have a sufficient annual fund for the purpose of exercising the powers conferred upon them, and that this fund can only be obtained by annual taxation upon the property of the corporation. But the power to levy this tax is assailed upon two grounds: First, because the power to levy taxes is inherent in the legislature of the State, and can not be delegated; for the sustaining which proposition the case of [2]Marr *v.* Enloe is cited and relied upon. Upon this point all we deem it necessary to say is, that the State of Tennessee is a sovereign and independent power, except so far as it is restrained by the Constitution of the United States, that its legislature has unlimited power of legislation except so far as it is restrained by the Constitution of the United States, and the Constitution of the State of Tennessee; that it has always been held, and never denied, that the power to create corporate bodies for all municipal purposes, and with the means of self-government, is a legitimate exercise of sovereignty on the part of the State by its legislature; and that there is nothing in the Constitution of the United States, or of the State, restraining or prohibiting the exercise of such power by the State. The case of Marr *v.* Enloe, if authority at all, is not applicable to this case; there it was held that the legislature could not transfer the power of taxation to the county court, because the justices were not appointed by the tax payers, and that it would therefore be taxation without representation. But in the case under consideration the tax payers of the corporation appoint the assessors, and are, therefore, represented by them. It is contended that, though the

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[1] Not in Tennessee Reports.

[2] In the case of Marr *v.* Enloe, **9**, 453, decided in 1830, CATRON, J., held: "Under the State Constitution of 1796, the taxing power is vested in the legislature, and can not be delegated to the counties; and the Act of 1827, 49, 1, authorizing the county courts to levy a tax to meet the current expenses of their counties, and the Act of 1824, 128, authorizing a navigation tax in certain counties in West Tennessee, are unconstitutional and void.

Act of 1815 might have been constitutional under the provisions of the old Constitution, which directed a specific taxation, that it has lost its force under the new, which directs taxation to be *ad valorem*. This argument we do not think maintainable. The Act of 1815 does not specify the mode or manner by which taxes shall be laid and levied by the corporation, but gives the power. If, then, under the old Constitution, one mode and manner should have been prescribed, and, under the new, another inconsistent therewith, it would follow that the new mode prescribed might and should be pursued, as the power is not repealed thereby. This would make it necessary, then, that corporations in levying taxes should do so upon the principles of the new Constitution, which provides, in art. 2, sec. 28, that all property should be taxed according to its value; and that no species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value. We, therefore, think that the power of the corporation of Knoxville to levy and collect taxes in this mode and manner is complete and perfect under the Act of 1815." **27**, 8. *Hope v. Deaderick.* 1847.

Power to Assess Poll Tax for Corporation Purpose.—COOPER, J.: "It must be admitted that the legislature, since the incorporation into the Constitution of 1870 of the limitation on the poll tax, have authorized counties, and perhaps towns, in addition to the usual taxes on property, privileges and polls for ordinary county and corporation purposes, to make a levy of taxes on property, privileges and polls for particular purposes. . . . It is probably a continuance of an old usage without properly considering the constitutional restriction. We are constrained to hold that the Constitution in this respect is mandatory, and that no county or corporation can levy a poll tax for any year exceeding the State tax for that year. And that if the defendant corporation had already levied for the year in controversy a poll tax of one dollar for the usual corporation purposes, its second levy of a similar tax for school purposes was unconstitutional and void. The complainants would, in that view, be entitled to perpetually enjoin the collection of the latter tax. But we are equally clear that the provision of the act is severable, and will not affect the residue of the act, nor the ordinance based thereon. The tax on taxable polls would constitute a very small part of the entire levy authorized for school purposes. And we have repeatedly held that a statute void in part, because beyond the competency of the legislature as to that part, will be valid in other respects which are severable." **83**, 647. [1]*Ballentine v. Mayor etc. of Pulaski.* 1885.

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[1] See same case, art. 1, sec. 8, p. 62; art. 2, sec. 2, p. 252; art. 2, sec. 17, p. 277; art. 2, sec. 29; art. 11, sec. 8; art. 11, sec. 12.

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ART. 2, SEC. 29. (The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation.) But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Fentress, Van Buren, White, Putnam, Overton, Jackson, Cumberland, Anderson, Henderson, Wayne, Marshall, Cocke, Coffee, Macon, and the new county herein authorized to be established out of fractions of Sumner, Macon and Smith counties; and Roane shall be excepted out of the provisions of this section so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient when the credit of such county is given or loaned to any person, association or corporation; Provided, that the exception of the counties above named shall not be enforced beyond the year one thousand eight hundred and eighty, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State.[1] [Const. 1831, art. 2, sec. 29, consisted of clause in parenthesis only.]

Taxation by Counties — County Purposes.

History of Internal Improvement Acts in Tennessee — Railroad a "County Purpose" — Exhaustive Discussion of this Question — Three Departments of Government — Constitution U. S., Art. 1, Sec. 1, and Art. 10, Sec. 1 — Vote of the People — County Court — Affirmatory Act — Contract — Retrospective Law — Counties are Corporations — "Voters of a County" — This a Government of Majorities. — These several cases from the counties of Davidson, Sumner and White, involving analogous principles arising under the several acts of the legislature, authorizing and regulating county subscriptions to railroads, were submitted to the court and argued and considered together. CARUTHERS, J.: "The leading questions in these cases are the same, differing only in details and mode of proceeding. We will consider them together, pointing out the differences so far as may be necessary. They all originated under the Acts of 1851–2, authorizing county subscriptions of stock in certain railroads. In each case the constitutionality of those acts is brought in question. In the two first the proceeding is by petition to the Circuit court for writs of *mandamus* to compel the county courts and their chairmen to perform the duties required of them in the statutes; and in the other, by bill in equity, filed by the taxpayers of White county to enjoin the collection of the tax imposed. In cases of so much

[1] For indirect or unimportant references to this section, see **73**, 422; **75**, 164; **87**, 225; 111 U. S. 412–420.

importance, involving, as these do, more than a million of dollars, and many millions more, perhaps, depending on the principles now to be settled in this State, it is gratifying to be able to announce that the Court concur in every material proposition. . . .

"The people of this State met in convention, by their representatives, in 1834, for the purpose of forming a new Constitution or amending or altering the old one, adopted in 1796, at the birth of the State. Not content silently to entrust the cause of internal improvements to the legislature, under the ample powers devolved upon it for that and all other purposes connected with their well-being and prosperity, they expressly enjoined this duty upon that body in section 9 of the 11th article of that instrument. . . . At the first session after the ratification of the Constitution by the people in 1835, the turnpike system was adopted, by which the State was embarked in the cause to the extent of two-fifths of the stock necessary to build any road in which the citizens would subscribe and secure the other three-fifths. In 1837 the aid of the State was extended to one-half, to be paid, in both cases, by the issuance of her bonds. A bank of the State was created to constitute a part of the system, and to aid the cause of education, which was likewise made a prominent object of the convention, as appears in section 10 of the same article. This system of improvement received a severe shock in the great revulsion of the commercial world, which occurred about the time it went into effect, and was arrested by the legislature in 1839. Roads enough, however, had been built or commenced, in the meantime, to demonstrate their effects upon the prosperity of the counties and sections through which they passed. Provision was at the same time made to aid in the construction of certain railroads, which resulted in discouraging failures. From this time, for several years, the spirit of internal improvement slumbered, and the constitutional injunction remained unheeded until 1851, when the people became fully aroused again on this subject by the spirit which actuated their convention, and gave birth to the constitutional mandate copied above. A new era in the cause of improvement had, however, by this time been ushered in, and its benefits fully tested by our sister States in the adoption of railroads for, or in addition to, turnpikes and canals. This system had proved itself to be as much superior to the former as that was to the common dirt roads, with their wooden causeways and melting embankments, which had preceded it. It was discovered that wherever a good system of railroads had been adopted, prosperity had crowned the efforts of the people in every branch of business, and comparative darkness and inertia seemed to be settling down upon every section in which it had been neglected. This contrast, becoming stronger and more glaring every year, at length aroused the State pride, and waked up the slumbering energies of our people to a sense of their interest.

This, in 1851, resulted in the election of a general assembly which made a bold movement to recover the ground which had been lost, and overtake, if possible, in their career of prosperity those States by which Tennessee had been so far outstripped. Her younger, as well as elder, sisters were looking back upon her in their rapid march and jeering her supineness and apathy.

"The acts now under consideration constitute a part of the system then adopted. It was provided that the bonds of the State should be loaned to the various companies then chartered to the extent of $8,000 per mile, upon the procurement of stock sufficient, from individuals and other sources, to complete the roads with that assistance. To this extent the aid of the credit of the whole State was given. But it was thought reasonable that the particular counties through which such roads might pass, in consequence of the peculiar and local advantages to them in their property and business, in addition to and above the general benefit to the whole people, should contribute, as a local community, a sum commensurate with such extra benefit, to be determined by themselves. To carry out that view, which seemed to be reasonable and just, these acts were passed. The first provision, by which a debt to be paid by all the people of the State is created, is based upon the consideration that the benefits of the system will be diffused throughout the whole, and certainly all are interested in the prosperity of any part of a community. The second provision goes upon the very reasonable conclusion that if such improvements be a blessing, those who are nearest to them are the largest participants; that is, the benefits derived are, as a general rule, in proportion to the proximity to them. If this be so, if the legislature were right in this conclusion, it is difficult to controvert, successfully, the justice and equity of this regulation, if it had the power, under the Constitution, to make it. But we are not to be understood as intimating that we have any power to base our action upon the inexpediency injustice, or impolicy of the enactments of that body, if they be not in conflict with the supreme law. And whether these acts are forbidden by that law is a grave and important inquiry, upon which we will now enter. The general statute passed January 22, 1852, ch. 117, which is made applicable to all the counties of the State, and under which the counties of Sumner and White proceeded, is in substance as follows: (quoting) On the 30th of December, 1863, the legislature passed a special amendatory act, to authorize the county of Sumner to issue her bonds in payment of her subscription of $300,000, at not less than ten nor more than twenty years, at six per cent interest, provided the company would receive them in payment, and the people should vote for the change in the mode of payment thus prescribed. In this event, it is made the duty of the chairman of the court to sign and deliver the bonds. An election was ordered by the court, which resulted in a

majority for the change. . . . The first and most important in the order in which we will consider them is that the said Acts of 1852 and 1853 are unconstitutional.

"1. Because they delegate a power involving taxation to the counties for an object not local. Whatever doubts may exist upon the abstract question of the authority of the law-making department to delegate any portion of its power to the subordinate civil divisions of the State, or town corporations, such doubts can not arise here, because this authority is expressly given in our Constitution, in specified cases, as to local matters generally. By article 11, section 8, the legislature 'have a right to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient.'

"2. As to the taxing power, the most important and delicate of all the legislative powers, article 2, section 29, confers upon the legislature 'the power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law.'

"It is not, nor can it be, controverted that this last section fully covers and sustains the act in question, if the railroad be properly a 'county purpose.' But it is insisted in the argument that it is not so in the sense of the Constitution. It is no easy matter to affix a clear and definite meaning to this phrase. It is less difficult to state cases which do, and others which do not, fall within it, than to draw any exact or palpable line between them. . . . Is a railroad a 'county purpose'? . . . One of the first wants, next to the necessary means of subsistence, in any community, is some mode of reaching each other for social or business intercourse and mutual assistance and advantage. Wild animals have their trails, the Indian his path, and the white man his roads and bridges. These are indispensable in the rudest organizations of society, for both private and public purposes. . . . As society advances in civilization and wealth, its necessities in this regard continue to increase, and greater and still greater facilities for intercourse of this kind are demanded. . . . So the common dirt road for wagons is superseded by turnpikes, and these again by the railroad. . . . But, like most other temporal benefits, it has to be purchased 'at a great price.' Individuals who have the spirit to do it are not often sufficient for the task, and everywhere it has been found necessary, by some means, to command the aid of corporations, counties, States, whole communities. Such is the system adopted in our State, of which the act under consideration is a part. The State subscribes $8,000 per mile (now $10,000 by act of the last legislature); the counties on the line of the road, and individuals, both natural and artificial, everywhere, as much as they choose—no more; no coercion, except to enforce such engagements as they may voluntarily make.

"Here, then, is a road to pass through the county of Sumner, touching her seat of justice, bringing to the doors of her citizens all the necessaries and luxuries both of the north and south, transporting all their surplus productions to the best markets and her people wherever interest, business or pleasure may call; and all this with that great dispatch which steam alone can impart to matter, and before which space dwindles into a point, and the people of distant States are brought into daily communication. If, then, an ordinary dirt road, or less common turnpike road, is a 'county purpose,' and a proper subject of county taxation, as well as bridges over their streams, because they are local benefits to the people, coupled with an advantage to the public generally having occasion to pass over them, how can it be said that a railroad is not, which answers all these purposes so much better, and produces a state of prosperity of which they are entirely incapable? Both are roads in the county, and we can not argue that because one is better, and more costly, if you please, than the other, the building of it shall not be regarded as a county purpose. Nor can the fact that it runs into or through other counties or States, or is owned or managed in whole or in part by others, deprive it of this character. This objection has never been urged, and could not be successfully, to a dirt or turnpike road, and applies with still less force to this. The length and magnitude of the work can only increase the local advantage to every point it may pass. It is the thing, and its objects and purposes, which defines its character in this respect, and not its extent and magnitude. . . . The same question, in principle, came up and was decided by this court in the case of Nichol *v.* The Mayor and Aldermen of Nashville. . . . Now, if that was a corporation purpose, is this not a county purpose? Is not this the strongest case? This road passes through the whole county, as well as the corporation of the seat of justice in the center. The same question has often been up in other States, and it is believed that there is but little, if any, conflict in the decisions. The questions should be regarded by the courts as settled and forever put to rest. Some of the cases, however, have gone further than we would be willing to go, or than this case requires. The common argument that the power of a county or town corporation is confined to their limits has been everywhere met and refuted or exploded. And the kindred argument that, to constitute a town or county purpose, the improvement or object for which the people are taxed must be entirely within their borders, has suffered the same fate. 9 B. Mon., 526; 5 Gilm., 405; 1 Jones, 70; 4 Comst., 419, 420; Ohio, 609, 625; Goddin *v.* Crump, 8 Leigh.

"It is, however, contended secondly, that if this be a county purpose, still these acts are in conflict with the Constitution, because they are not final and obligatory, but depend for their vitality upon the vote

of the people; and that this is a transfer of legislative power to the people, which is contrary to our republican system of government, as set up in the Constitution, as well as its genius and cardinal principles.

"With these latter tests, it may be remarked, we have nothing to do, except so far as they may tend to illuminate what is written in the Constitution. If the construction and administration of our laws, supreme or subordinate, were to be governed by the opinions of judges as to the genius or general principles of republicanism, democracy, or liberty, there would be no certainty in the law; no fixed rules of decision. These are proper guides for the legislature where the Constitution is silent, but not for the courts. It is not for the judiciary or the executive department to enquire whether the legislature has violated the genius of the government, or the general principles of liberty, and the rights of man, or whether their acts are wise and expedient, or not; but only whether it has transcended the limits prescribed for it in the Constitution. By these alone is the power of that body bounded; that is the touchstone by which all of its acts are to be tested; there is no other. It would be a violation of first principles, as well as their oaths of office, for the courts to erect any other standard. . . .

"It has become an axiom in our jurisprudence, now nowhere disputed and everywhere adopted and acted upon, that the courts have power, and it is their duty, to pass upon the constitutionality of an act of the legislature, and declare it nugatory, if there be an irreconcilable conflict. Yet the rule is, as generally recognized, that it would be inconsistent with that comity and confidence which should ever subsist between co-ordinate departments of the same government, and the high respect due both to the intelligence and honesty of the people's chosen representatives, not to decide upon their acts with every presumption in favor of their validity, which should be overcome only by the clearest convictions of judgment, after the most grave and mature examination and profound reflection. 3 Dall., 171; 4 Id., 14; 8 Cranch, 87; 14 Mass., 345; 11 Penn., 70; 2 Mon., 178; 9 Dana, 514.

"The admitted theory of our government is that all power of every kind is derived from the people, as the natural source or fountain. In every government, no matter by what name called, or whether vested in one or many persons, these powers are naturally divided into three classes: the legislative, the law-making; judicial, the law-expounding; and executive, the law-enforcing. . . . Each was made sovereign in its sphere, but powerless beyond it. They are all agents of the people, and the Constitution their power of attorney. All acts beyond this are nugatory and void; but, within it, binding upon all, whether right or wrong, politic or impolitic. No relief can be obtained if the charter is not transcended. Partial evil must be endured for the general good. The harmony of the system must be maintained. . . .

"The basis upon which the whole American fabric has been erected is that the people being in possession of all power, have the right to partition it out as they think most conducive to their happiness, in the form of written Constitutions, by which all invested with shall be effectually controlled. This is the supreme and paramount law, before which all must bow with reverence. Over its barriers even the legislature, with its mighty powers for good and evil, can not pass. This limitation would be worse than useless if there were no power in the State to decide upon their acts and to bring them to the test, whenever any controversy arises on the subject. This delicate and important duty has been necessarily devolved upon the judiciary. . . . Of necessity they must decide what the law is. In doing this they are obliged to look, first, to the supreme law to determine upon any conflict with it that may be alleged. This necessarily involves the right to declare the act of the legislature void wherever such conflict is found clearly to exist. Fletcher *v.* Peck, 8 Cranch, 87. . . . 'The legislative authority of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives, both dependent on the people.' Const. Tenn., art 2, sec. 3. Then, the only legislative powers of congress are those specified in the instrument—'herein granted'—but no others; but those of the general assembly of the State are general, extending to all powers of government properly denominated legislative, falling under that clause of powers according to the accepted meaning of the words used; not that which is 'herein granted,' but the 'legislative authority of the State,' all the law-making power. But still, the past experience and sound forecast of the people were too great to leave this immense grant of power without limitations and restrictions. These are carefully and emphatically prescribed in both Constitutions. . . . In the Constitution of Tennessee, article 1, many of them are set forth. In these and other clauses we find guards and limitations upon legislative power in the fundamental law. These, as it must be presumed, were regarded as sufficient checks on the power granted, and no other can be added but by the same authority. Were it not for these restrictions the legislature of Tennessee would be as omnipotent as the parliament of Great Britain is assumed to be by the great commentator; and the same would, or might, be the case if there were no power in the State to hold it to its orbit and enforce the checks and balances of the Constitution. And these or worse consequences might follow if this restraining power, not so directly under the control of those upon whom all power acts, were allowed to be governed in their action by arbitrary rules established by itself, instead of the written Constitution established by the people. The one would be as fluctuating as the opinions and prejudices of men, but the other is fixed and stable. In this lies the great advantage of a written Constitution—a settled,

unbending, supreme law. . . . Is the Act of 1852 *forbidden* by any clause in the Constitution of the United States, or that of the State of Tennessee, because of the reference made to the people? . . . The court is of the unanimous opinion, and so decide, that the reference to the people of the question of subscription or no subscription of stock does not invalidate the act by bringing it in conflict with the Constitution. This is a general law—perfect, finished and unconditional. It is not made to depend for its vitality upon the vote of the people, or any other future contingency. Whether Sumner, or any other county, act under it or not, it is still the law of the land, addressing itself to all the counties of the State, until repealed. . . .

"But, again, this act provides for the creation of a county debt for stock in a road, and a tax to meet it, and this is suspended on a vote of the people, and not the action of the court. The legislature, it is admitted, could do this, or it could empower the court or a corporation to do it, but can not leave it to the people. . . . By another section the 'legislature is authorized to vest power over private and local affairs in the courts of justice.' Art. 2, sec. 8. But here, in relation to the very delicate subject of taxation, the authority to impose taxes for county purposes (and we have seen that this is such a purpose) is to be communicated to the 'counties'—not to the courts, nor to the justices, nor to the officers. And how shall this power be exercised—by what agency or instrumentality? By the County courts or Circuit courts, or by representatives from each civil district, selected for that purpose in convention, or by the people? No. The mode of doing it is left to the general assembly. The authority is to be exercised by the '*counties, in such manner as shall be prescribed by law.*' The legislature, then, have, by the Constitution, the unequivocal power to determine and direct how and in what manner these taxes may be imposed by the counties upon themselves, as well as to what extent and for what purpose. That the County court may have been empowered to act for the county on this subject is no objection to the different mode or agency adopted in the act. It may certainly be said with great safety that as the legislature was expressly entrusted with the selection of the mode and manner of imposing the debt and the tax upon the county, it could not have adopted a plan more unexceptionable than to refer the question directly to the taxpayers themselves. It was reasonable and just, the Constitution permitting it, that it should be left to the people of the county to decide for themselves, in view of the burdens it would impose upon them, on the one hand, and the advantages on the other, whether they would go into it or not. The people might well consider that, although the debt proposed would be heavy, and the taxes onerous, for some years, yet their lands would be greatly enhanced in price; their facilities in trade and business, in transportation of their surplus pro-

duce, and intercourse with the rest of the world would amply compensate them. The objection to this mode of deciding the matter, even if we were at liberty to decide upon grounds of expediency—which we have seen we are not—that the people are liable to be, and were in this instance, misled by parades, barbecues, and torchlight processions, got up by the friends of the measure, and backed by eloquent speeches by which the voters were gulled, deceived, and carried away, can not be for a moment entertained. It is striking at the foundations of our institutions, and would annul all popular elections. It is a fundamental principle, in an elective popular government, that the people are capable of self-government, and may be safely trusted with their own interests. Besides, this was a matter among themselves and others, and others interested in their action can not be affected by it; they can not be allowed to take advantage of their own wrong in a contest with others. This is not a controversy between the affirmative and negative voters, but between a corporation and the whole county, bound by a vote of the majority. . . .

"The clause which forbids private property to be taken for public use (art. 1, sec. 21) has no application, because that rests upon the doctrine of eminent domain, and this upon the right and power of taxation. They are entirely distinct, and in every respect dissimilar. The former is when something beyond a mere equal share of the public burdens is taken from the citizen, and therefore he must be paid by that public to whose use it is applied; it is made a debt against the community of which he is a member. But this debt, as well as others which are contracted for the general good, can only be paid by taxation. The amount necessary for this and all other public purposes must be raised by exactions upon all, in some form of taxation. In relation to this the idea of refunding, or compensation, can not be conceived. It would be simply and palpably absurd. Here no man's property is taken, but a tax imposed. . . . It is further insisted that if the Act of 1852 be not repugnant to the Constitution, and the proceedings under it subject to no fatal objection, yet the changes made by the amendatory Act of 1853, under which this demand is made, are such as to annul the subscription and render the whole proceeding void. Let us examine it. This act refers to the proceedings under the former act, ratifies and confirms them, declares the subscription of the stock valid and binding upon the county, but provides a different mode of paying for the stock; that is, by the issuance of the county bonds, payable in no less than ten or more than twenty years, at an interest of six per cent, to be signed by the chairman, provided a majority of the people vote for the change, and the board of directors for the road will agree to it by receiving them in payment. The question was submitted to the voters, and carried in favor of the bonds, and the company agreed to receive them. . . .

"In what light is this transaction to be considered? Is it not a contract? A proposition was made by the railroad company to the people of Sumner county, through their County court as an instrument, to subscribe for a certain amount of stock to build that part of the road which passed through their borders; they accepted the proposition, and the contract was closed by the subscription. All this was done, as we have said, in substantial conformity to the law, so as to bind both parties. The contract is closed. The county is bound for the money, and the corporation for the stock. Afterwards, by this act, the legislature, under whose authority the contract was made, empower the parties to change it, if they choose, in the relation to the time and mode of payment, and some other particulars. The same parties who made the contract—the people on the one side and the board of directors for the road upon the other—agree to it. Whose rights are affected? What rule of law forbids it? The parties to any contract may surely change, impair, or even destroy it, by mutual consent. The legislature can not act retrospectively upon a contract so as to impair its obligation or affect vested rights, but the parties to it may, when no other rights but their own have arisen under it. . . .

"Counties are not corporations, but civil and political divisions of the State. For some purposes they are mere civil divisions, but for others they certainly are corporations. They are, therefore, sometimes called *quasi* corporations. They are political, aggregate corporations, capable of exercising such powers as they may be vested with by the legislature. Ang. & Ames, 17, 24; 9 Wheat, 907; 1 Bald. 222. Any body of persons capable of acting as one man, and in a single name fixed by law, having succession, is, in some sense, a corporation. Without going into all the ramifications of this subject, to be found in the books, it is sufficient to say that the counties in our State are clothed with the powers and attributes of corporations to a sufficient extent to be able to act and contract; to become debtor and creditor, so as to subject all the persons and property within their limits to taxation in any mode that may be prescribed by the legislature. And whether this be by the action of the County court, or a vote of the people, or any other agency, can make no difference. The legislative power is not restricted or confined, in this particular, except as to purpose—not as to mode. The only inquiry upon this point is, what saith the law?

"If the county should take the stock as a corporation, it must own it as such, and can not distribute it among the people, and in the proportions they may pay the tax. Why not? Certainly nothing could be more just. It is a debt against all, and for which all are bound as an aggregate mass; but as the debt is discharged, the thing for which it was contracted is distributed to each in proportion to what he may pay. He who pays most money is to own most stock. No provision could

be more just and equitable. It would, in some respects, operate unjustly to retain the stock, when paid for as a county fund, to very many who had borne the burden of it. The population of a county is constantly fluctuating. One man who had paid a part of the tax removes, and another who paid none of it, comes into the county; in which case the one who had contributed nothing would have all the advantages of the fund, which might relieve him from county taxes, as well as the road which was built by it, and the other, who had paid and toiled for the benefit, would be entirely deprived of it. The distribution of the stock avoids this injustice, as it becomes property and goes with the owner. If there were no other reason this would be sufficient to sustain the propriety of this provision of the statute. And as to the discretionary power of the legislature to order it the one way or the other, there can be no question. But it is said it cannot be a county purpose, as required by the Constitution, unless the stock belongs to the county as a corporation. It is not the stock as an investment to which reference is made in this clause, but the road in which the stock is held. If this were not so, the people might be taxed to raise a fund to take stock in a steamboat or factory, or California mining company, provided the authorities should allow it to be done. But the Constitution protects people from taxation for speculating enterprises. It can only be done for some local improvement or benefit; the thing to be done with the taxes raised must in itself be a 'county purpose.' The compensation to the payer of the taxes may be in the local benefits, alone, to him and his neighbors; or to this may be added stock in the improvement, to the extent of his contribution, as in this case.

"But it is here objected that the result of this proceeding, disguise it as you may, is to make a citizen take stock whether he will or not; and that is oppression. That is to say, if we understand the argument, that although it might be lawful to tax the citizen to build a road, if that is the end of it, yet if you make him the owner of stock in it to the extent of his contribution in taxes, and return to him any part of the outlay in tolls or profits, it becomes unlawful and oppressive. It is very true that no man can be forced to enter into a contract for stock in a road, or for any other purpose, without his consent; it is of the essence of a binding contract that the party freely assented to it. But this is not a contract with the individual citizen but with the community, the aggregate corporation, or body politic, of which he is a member, and by the legally expressed will and lawful engagements of which he is bound. The consent of such bodies is to be given in such manner as may be prescribed by law. Here it was to be done by the community to be bound, itself, and to be ascertained by the vote of a majority. A majority gave this consent, and entered into the engagement. Shall not the minority be bound by it, and incur equal responsibilities, as well

as participate equally in any advantages that may result? Can the minority complain of oppression by the majority, when the latter take the same burdens upon themselves? It is the very first principle of all republican governments, and every free society or organization of men, that majorities must rule and control. Kyd, 422; Ang. & Ames, 396, 397; 7 Serg. & R., 517. This principle is only limited by positive regulations. Id. Has it ever been thought that any contract or lawful imposition of taxes, or other burdens, could be repudiated by the minority because it did not meet their approbation? In every community or society consisting of many there must be some mode of concentrating the power of action into a single will or purpose. In a despotism, this is in one individual; in an aristocracy, in a few; and in a democracy or republic, in all. But in each and all the result is the same—one purpose in action to which all must submit, or there is an end to all government and order. Happily, under our institutions the principle is held sacred that none are bound unless a majority agree to it—but then all, every individual equally, whether he approve of the decision or not. Perhaps there never was a tax laid by the legislature, either State or national, by the County court, or even by the people, where the power to do so is by law vested in them, which met the approbation of every taxpayer. A very honest difference of opinion may exist as to the tax, or the object to be accomplished by it; and to produce action, some mode of settling the question must be resorted to. In this case it was made to depend upon the result of a popular election; the voice of the majority has been heard, and must be obeyed by all. If the decision be wrong, or the burden great, it is better to endure it than to abandon a sacred principle which underlies all our institutions. By an abandonment of this, if it were in our power to do so, the partial evils of a temporary wrong would be but as the weight of a feather to those which would follow. If the first principles of our system are abandoned, the whole fabric must fall to the ground, 'and great would be that fall.'

"The Davidson county case presents some different questions. The act under which it proceeded was different from the other in a few particulars. It was passed at the same session (Act 1852, ch. 191, secs. 12–20), and only applied to a few counties, including Davidson. . . . The question made is, whether this act requires a majority of all the legal voters residing in the county at the time of the election, or only a majority of those who may attend the polls and actually vote. We are referred to the latest State and county elections to show the number of voters in the county, and then to the vote on this question to prove that the number of affirmative voters falls very far short of a majority of the legal voters in the county, although they exceed by several hundred the negative votes. . . . When a question or an election is put to

the people, and is made to depend on the vote of a majority, there can be no other test of the number entitled to vote but the ballot box. If, in fact, there be some, or many, who do not attend and exercise the privilege of voting, it must be presumed that they concur with the majority who do attend, if, indeed, they can be known at all to have an existence. Certainly it would be competent for the legislature to prescribe a different rule. But when they simply refer a question to the decision of a majority of the 'voters of the county,' it can not be understood that they mean anything more than those who see fit to exercise the privilege. Great inconvenience would result from the opposite rule. Suppose the vote should be very close—one, two, or a dozen majority, one way or the other—how could the fact be ascertained but by the box of the exact number entitled to vote? It can not be presumed that this or any other question submitted to the people was intended to be involved in such embarrassment. Whenever it is so intended by the law, it will be expressed, and some convenient mode prescribed to settle any controversy that may arise. They might say, to be sure, that a number equal to a majority of those who voted at the last election for governor, or for electors for president, or prescribe any other arbitrary test. Though this might not be the true test of the number then in the county, yet it would be a sufficient approximation to certainty to answer the purpose. This or any other prescribed test would be binding, though arbitrary, and of doubtful expediency. But as none such, or any, is given by the legislature, we take it for granted, and so construe their language, that it was only intended to look to the ballot box for the 'voters of the county,' and from that allow no appeal. Ang. & Ames, 398, 399."[1] **33**, 638. *L. & N. R. R. Co. v. Davidson County et al.* 1854.

Revenue Collected for One County Purpose Can Not be Diverted to Another.—By the Act of 1855 ch. 6 (C. & N. 200), the legislature expressly delegated to the County courts the power to levy a tax for county purposes. HARRIS, J.: "In the exercise of that power the fund which is the subject matter of this controversy was levied and collected, and the legal title to it was vested in the county trustee, for county purposes. Now, has the legislature the power to divert the fund from the purposes for which it was levied and collected, and transfer it to another separate and distinct corporation, to be by it appropriated and used at its discretion? We think not. This would be an unauthorized interference with vested rights. . . . The County court levies the taxes with the view of providing for the current expenses of the county, and if the legislature has the power to divert the fund thus levied to other and different purposes, it has the power to bankrupt the county at pleasure. Perhaps in the present case it is not necessary to determine

[1] Code 1858, 1142; T. & S., 1142; M. & V., 1278 et seq.

whether the legislature has the power, under this provision of the Constitution, to authorize the County court to levy and collect 'a tax for corporation purposes,' as they have not exercised such power, but have only attempted to divert a portion of the taxes, in one county in the State, from the purposes for which they were levied and collected to a wholly different purpose. This they can not do." **37**, 192. *Mayor etc. of Nashville v. Towns.* 1857.

"County Sovereignty"—Tax Levy to Pay County Debts—Grant of Power for this Purpose Carries with it the Obligation to do So—Evils Under Constitution of 1796 Intended to be Remedied by that of 1834.—"This was a proceeding under the [1]Act of 1856, ch. 90, to compel the justices of Scott county, by a writ of mandamus from the Circuit court of said county, to levy a tax sufficient for the discharge of four several judgments, recovered by the relator against the commissioners of said county, as a portion of the amount agreed to be paid for the building of the court house of said county.

McKinney, J.: "This provision (of the Constitution), it is insisted, merely empowers the legislature to delegate to the counties the right of authority to levy taxes for county purposes; but does not confer upon the legislature the power to coerce them to do so. In other words, that when the authority to impose a tax for a given county purpose has been conferred upon the county, and the manner in which it may be exercised has been prescribed, the power of the legislature is exhausted; and it is left entirely optional with the agents to whom the power is delegated, whether they will exercise it or not. That the authority to impose taxes for county purposes authorized to be delegated by the legislature to the justices of the several counties, or other agents, is a portion of the sovereign power of the State, which, under our Constitution, is lodged in the legislative department of the government. That its exercise, in its very nature, is discretionary, and can not be controlled by the judicial department. And, consequently, the justices of a county, or other agent selected, as the depository of a portion of such power, can no more be coerced to exercise it by the judicial tribunals, than could the legislature itself; nor can the legislature empower the courts to do so. This is certainly carrying the notion of 'county sovereignty,' as it has been called, to a most extravagant length, to say no more of it. Yet it is insisted that this doctrine is maintained by the case of The Justices *v.* Hoodenpyle, 7 Humph., 145, decided by our predecessors in 1846. If that case is to be understood as deciding that the legislature does not possess the constitutional power to provide for the compulsory assessment of a tax, to discharge a debt properly contracted under the authority of a general law, for a

[1] Code 1858, 534 et seq.; T. & S., 534 et seq.; M. & V., 593 et seq.

legitimate county purpose, then we feel constrained to dissent from its authority.

"The power to contract debts for the erection of public buildings, and various other county purposes, is indispensable to every county, and has been conferred by several general statutes. And as taxation is the appropriate means of raising funds for the discharge of such debts, the power to impose taxes for such purposes has been conferred, generally, upon the justices of the County court. The want of authority in the legislature to delegate the power of imposing taxes to the County courts for various purposes was felt to be a serious evil under the old Constitution; and, looking to the motives which must have influenced the convention in the adoption of the provision on this subject, above quoted, can it fairly be supposed that it was merely intended to confer a discretionary power upon the counties to impose taxes for the discharge of their just liabilities, but not to impose any duty or obligation upon them to do so? Was it deliberately designed that these quasi corporations should be invested with the power to create debts for legitimate and indispensable county purposes and yet be absolved from all legal obligations, and placed beyond the power of coercion to discharge such debts? We do not so understand the constitutional provision in question.

"The power was given not merely that it might, but that it should be exercised in the cases contemplated by the Constitution. The grant of the power to raise money in this mode for the discharge of county liabilities carries along with it, by necessary implication, the obligation to do so. If it be competent for the legislature to empower the counties to impose a tax, and dictate the manner in which it shall be done, surely it can provide for the exercise of the power. If not, the authority to delegate such power to the counties is unmeaning and illusory, and practically the creditors of the county are left without remedy. To this conclusion we would regret exceedingly to be forced. But we feel no hesitation in declaring the Act of 1856 to be a valid and constitutional law; and more than this, a most just and salutary law, highly creditable to its authors, as manifesting a determined spirit of opposition, *in limine*, to everything that savors of repudiation in low as well as in high places."[1] **37**, 698. *Newman v. Justices of Scott County.* 1858.

Railroads—Subscriptions by Counties—Counties Civil Districts and Corporations.—FREEMAN, J., held: "Under this provision of the Constitution of 1834 the legislature has the power to submit the question of subscribing stock to a railroad company to a vote of the people,[2] and the authority given to the county by the legislature to make such sub-

[1] This opinion overruled Justices of Cannon County v. Hoodenpyle, **26**, 145.

[2] T. & S., 1142 et seq.; M. & V., 1278 et seq.

scription is made dependent for its exercise on the result of a vote of the citizens for or against the proposition"; and that this provision "confers no power upon counties and incorporated towns to impose taxes for any purpose, but only empowers the legislature to authorize them to impose taxes for county and corporation purposes, and this the legislature may do in such manner as it may prescribe by law, and when such authority is given, the county acts under the authority conferred by law, and if an election is required, or other prerequisite on which the taxes shall be unpaid, or the liability incurred, then the law must be pursued, and the power exercised in accordance with the statute. In so far as the county shall act beyond and outside of the authority conferred in any material requirements, it acts without any authority at all. It is settled that while counties are for some purposes but civil divisions of the State, for others they are corporations—they are political, aggregate corporations, capable of exercising such powers as they may be vested with by the legislature, and this being so, it follows that a member or class of members of such corporation can ask the interposition of a court of equity to prevent the use of the funds of that corporation to an unauthorized purpose, or to ask that a liability contracted to be fixed upon the corporation, by which he is to be bound to pay him money, as an integral part of such corporation, shall be annulled and made without authority." 60, 76. *Winston v. T. & P. R. R. Co. et al.* 1873.

County May be Authorized by Special Law to Vote on Question of Subscription to Railroad—Art. 11, Sec. 8 — Case Overruled: Wallace v. Tipton County.— The [1]Act of February 25, 1867, providing that "the County court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company of an amount not exceeding two-thirds of the estimated cost of grading the road-bed through the county and preparing the same for iron rails"; and providing, that after the subscription shall have been made by the court, the court should levy an assessment on taxable property to pay said subscription; and providing that the court might issue bonds for said subscription, was considered from a constitutional standpoint.

Freeman, J.: "It is maintained that by what is known as the general internal improvement act of the legislature of 1852, entitled 'An Act to authorize and regulate county subscriptions for railroad stock,' a general rule, or law, was enacted regulating this question of county subscriptions to these corporations, and the leading feature of this law was that before any subscription could be made, the County courts were required

[1] M. & V., 1278 et seq.

'to call for the approbation of the legal voters of the county,' by means of an election to be held for the purpose, the precise mode of holding which was all definitely fixed in said act; and that this was the 'general law of the land' on this subject at the time of the passage of the acts hereinbefore cited. These acts, authorizing the subscriptions contemplated to be made by the counties through which this road should run, adopted a different rule for such counties, and authorized these counties to make their subscription through and by the action of the County courts alone, without any submission of the question by election to the people of the county. It is earnestly contended that this law, then, is obnoxious to the Constitution, either in the fact of suspending a general law for the benefit of these counties, or by it these counties receive a benefit inconsistent with the general law of the land, or that they obtain a privilege not had nor obtainable by other counties of the State. The Act of 1852, we may here say, is not suspended by the Act of 1867, nor professed to be. It remained in full force and effect. . . . It was not a suspension of this law, then, and can only be attacked, we take it, on the ground that the Act of 1867 was a law passed 'for the benefit of individuals inconsistent with the general laws of the land.' . . . Assuming, for the argument, that the difference in the two acts—that of 1852 and that of 1867—is a benefit not consistent with the general law on the subject of county subscription, is this latter act unconstitutional?

"We take it the real question on this aspect of it is, whether, under art. 2, sec. 29, of the Constitution, the counties and corporations of the State can be each separately authorized to incur a liability for such county and corporation purposes as the legislature may choose to prescribe by a law passed giving such authority to the particular county or incorporated town, or whether every such tax must be imposed by a general law, equally applicable to every county and corporation in the State, thus making one general regulation on this subject for each and every county and incorporated town in the State. . . . The legislature has authorized these counties to contract for stock in a railroad company, and incidentally to levy a tax to meet the burden thus incurred. Must every such contract be by virtue of a general law, one operating equally upon every county and municipal corporation in the State, or may it be done by a special law? One view of this question seems conclusive of the result. The same authority is to be exercised, or prescribed by law, to both counties and incorporated towns in the State. It has never been contended by any one that a municipal corporation could not be authorized by a special law to make contracts, and levy taxes to meet them. In fact, the purposes for which these corporations might incur obligations in the form of contracts, under the Constitution, were as variant as the powers conferred on these bodies—some, for instance, were authorized to contract for waterworks and gas,

others not; some were authorized to establish a system of municipal common schools, others were not. Yet it was never conceived, we take it, that these powers were void, or that in any case they were to be conferred by a general law, equally authorizing any other municipality to do the same. This is the rule as to corporations created under the Constitution of 1870, but is one of the material changes introduced into our system by that Constitution. So, under the same authority, the various counties of the State might be authorized singly to contract for any public work legitimately a county purpose, and to levy a tax to meet the obligation thus incurred, or issue its bonds, by way of anticipating its revenues, as a mode of doing the thing authorized, without at the same time every other county, that might not have need for any such work, to do the same thing. Such has been the uniform practice under the Constitution of 1834, down to the adoption of the Constitution of 1870, and, so far as we know, never questioned. Several hundred such acts are cited by counsel, fourteen of which were passed in 1837, only three years after the adoption of the Constitution of 1834.

"Such authority to contract on the part of counties and incorporated towns can not be fairly included under the terms of art. 11, sec. 7, of the Constitution of 1834. That section is in terms only a prohibition against granting special privileges to individuals, or suspension of a general law for the benefit of individuals, or grants of rights, privileges or immunities or exemptions to individuals, other than those granted to all other members of the community existing under like conditions. But these prohibitions as to privileges can have no rightful application to the contracting obligations by which burdens are self-imposed by counties and incorporated towns. They are neither within the spirit or letter of this clause of the Constitution. The only limitation imposed upon the legislature as to the power of taxing counties, or their taxing themselves, is that the tax shall be for a county purpose. When such a purpose is to be carried out, the legislature may authorize the several counties and incorporated towns to impose the necessary taxes to meet the burden thus contracted. The language is, the *several*, not *any* county; that is, each for itself may be so authorized to tax, in such manner as shall be prescribed by law. . . . In this view of the question, we see no constitutional objection to the law of 1867, which simply authorized the counties through which this railroad ran to contract to aid in the work; nor any necessity that any other counties, through which it did not run, having conferred on them the same power. . . . The language used, 'authorizing the several counties and incorporated towns to impose taxes for county and corporation purposes,' very clearly implies that the county purpose for which one may tax may be peculiar to one county and not to another; and such, we know, is practically true.' . . .

"We think it certain that the Constitution of 1834 did not intend that all local improvements for county purposes, which might be deemed necessary or proper by any county, should only be authorized by a general law. On the contrary, these municipal divisions of the State were understood and well known to have different wants, the one from the other. The evil under the Constitution of 1796, as shown in the case of Marr *v.* Enloe, was that all lands in the State were required to be taxed in such a manner that no one hundred acres should be taxed higher than another, and the County courts were not authorized to tax at all for county purposes. To remedy this last, the Constitution of 1834 provided that they might tax as authorized by law for county purposes, and as these purposes in one county might require one rate, and in another a different one, the legislature has left the amount to these local *quasi* legislatures, only fixing the limit beyond which they should not go, usually not beyond the amount of the whole sum levied for State taxes. But this shows that no general law was possible on this subject that could by a general rule meet the wants of every county, and so it was left to the local discretion of the magistracy of the county to fix the amount to be levied in each county, as their wants might demand. In this way each county may be authorized to incur such liabilities as its immediate interest might demand, but there could be no need that all the other counties should have the same rule applied to them, they having no such interest to subserve. . . .

"To recur for a moment to the language of the Constitution giving the authority to tax themselves, by the action of the legislature, to counties and corporations, we think its terms indicate definitely that such power might be conferred in any particular case on any one or more counties. It is: 'The *several* counties and incorporated towns in this State.' The word 'several' is defined by Mr. Webster—'each particular, or a small number, singly taken.' This being so, the plain meaning of the words would be that each particular county, or a small number, or any number of the counties, singly taken, may be so authorized. If the power to tax in any particular case may be conferred on a smaller number than the whole number in the State, or on one, there can certainly be no reason why the power to incur an obligation for which the tax became necessary should be required to be given by a law more general than the one that authorized the taxation to meet the obligation thus incurred. . . . The case of R. H. Wallace *v.* The County Court of Tipton County, in which different views were expressed from this opinion is overruled." Judges TURNEY and DEADERICK dissented. **75**, 153. *Lauderdale County v. Fargason.* 1881.

Bonds—Enabling Act Annulled by Constitution of 1870 Adopted Thereafter—Contract to Issue Same Made Before—Vested Rights—Donation—Interest—Usury—Partial Laws.—J. M. DICKINSON, Sp. J., held: "Chapter 50, Acts 1869–70, sec. 8, empowering Haywood County to issue bonds in aid of railroad construction upon a *majority* vote was annulled by" this section. "If the power to issue bonds under the enabling act has not been exercised, and no binding contract has been made to issue them before the annulling Constitution goes into effect, then the exercise of such power thereafter is unauthorized and void; but if such contract has been made anterior to the adoption of such Constitution, bonds delivered in pursuance of such agreement subsequent to such adoption, are valid. . . . Sec. 8 of ch. 50, Acts 1869–70, empowering Haywood county to *issue bonds in aid of railroad construction*, authorized, by implication, the county to subscribe for stock, to be paid for by said bonds, and the county having voted to issue the bonds therefor, and the County court having agreed to subscribe for the stock and to issue the bonds, and the railroad company having accepted such subscription and agreement to deliver the bonds, all of these things having been done before the Constitution of 1870 went into effect, such rights became vested as could not be affected by the new Constitution, and the bonds delivered after its adoption are valid. If a donation of bonds be authorized, and it is the duty of the County court to issue the bonds upon a favorable vote, and an agreement is made by the County court to issue the bonds, which is accepted by the railroad company, and the bonds are issued in pursuance of such agreement, though after the adoption of the annulling Constitution, they are valid in the hands of an innocent purchaser. Bonds issued pursuant to an act authorizing them to bear interest, lawful at the place where they are payable, are not usurious on their face, if the interest contracted for was lawful at the place of payment, though it be in excess of the rate allowed in this State; and such a law is not a partial law, and is constitutional." 87, 781. *Nelson v. Haywood County.* 1889.

Power of County to Levy Tax—County Purposes—Police Duties—Court Expenses, Etc.—FREEMAN, J.: "By the Act of 1837, carried into the Code, sec. [1]4163, 'the County courts are required, at the first term in every year, to impose and provide for the collection of the tax for county purposes, and fix the rate thereof,' etc. This levy is made in pursuance of the Constitution, art. 2, sec. 29, giving power to counties and municipal corporations to levy taxes for county and corporation purposes. It is obvious from this clause of the Constitution that the only taxes the County courts can ever levy are such as may be levied for county purposes. These purposes are to meet such changes in the

[1] M. & V., 489.

way of expenditure as by law are fixed upon the counties, and appertain to the general administration of county affairs—police duties, the expenses of courts and the like." 73, 709. *N. & C. R. R. Co. v. Franklin County.* 1880.

In Certain Local Matters Counties Act Under Delegated Authority Only.—ANDREWS, J., held: "The counties, exercising in certain local matters the sovereign power of the State, act not in virtue of any inherent authority as corporations, but under a delegated authority, within the limits prescribed by the Constitution and laws which constitute their charter." Thompson's Tenn. Cases, p. 312. *Hunter v. Campbell County.* 1869.

County as Stockholder, Etc.

County Court—Contract for Public Bridge Unauthorized, When.—WILKES, J., held: "A contract between a county and a railroad company, entered into without the assent required by the Constitution of a three-fourths majority of the people expressed at an election held, pursuant to law,[1] for that purpose, is unauthorized and void. Which provides that, in consideration of a stipulated sum to be paid by the county, the railroad company shall build a combined railway, wagon, and foot bridge over a stream for its own and the public use, and that the railroad company shall forever keep the bridge in repair, and shall construct certain lines of railway, and shall concede to the county the fee in certain portions of the right of way, and also for the public benefit, the use of its track by other companies, and special freight rates for particular products. By such a contract, the county becomes, in violation of the Constitution, a stockholder with the railroad company, and loans its credit to the railroad enterprise."

In delivering the opinion Judge WILKES said of the third clause of this section: "It is evident that the letter and spirit of this provision is that the county shall not be a stockholder nor joint owner with any company, association, or corporation in any enterprise or improvement, although it may be one in which the county may be otherwise authorized to enter." 92, 43. *Colburn v. Railroad.* 1894.

Taxation by Municipal Corporations.

Legislature May Withhold Power to Assess Taxes.—COOPER, J.: "The power to delegate would necessarily imply the possession of that power by the body which delegates it. And how the authority to delegate an essentially legislative power can deprive the legislature of that power, it is difficult if not impossible to conceive. Such a result can not be deduced by any rule of logic, or natural reason. If, therefore, local powers of taxation come only from the legislature by delegation,

[1] M. & V., 1452-3.

it necessarily follows, as a corollary, that the legislature may at pleasure, whenever in its opinion the public exigency requires, withhold the grant, and exercise the power itself. There is nothing in the Constitution which prevents this result. Although municipal corporations existed at the adoption of the Constitution, and are recognized by it, yet no provision is made for securing their existence, or perpetuating any of their forms or rights, as in the case of the County courts. Pope *v.* Phifer. On the contrary, municipal corporations were, at and before that time, as they have always been, subject to the absolute control of the legislature. Instead of throwing any restraint over the exercise of this unlimited power, the Constitution, by art. 11, sec. 8, expressly says that the general assembly may provide, by general laws, for their organization, 'which laws may at any time be altered or repealed.'" Judges FREEMAN and TURNEY dissented. **70**, 443. [1]*Luehrman v. Taxing District of Shelby County.* 1879.

Taxation—Local Assessments—Meaning—History of This Section.—FREEMAN, J.: "If the State government is bound by the limitations of section 28 in its mode of collecting revenue for the general purposes and duties imposed on that government, it would seem equally clear that the municipal government of each town was equally bound by the restrictions imposed in section 29 of same article, and that for these purposes it could only impose taxes; and imposing such taxes, '*all property shall be taxed according to its value, and upon the principle established in regard to State taxation.*' In other words, there being but one kind of *taxation* authorized by the Constitution for the raising of revenue for the general purposes of the State government, and that regulated by art. 2, sec. 28, that there was but one mode or kind of taxation for corporation and municipal purposes, and that regulated by section 29 of that article, and to be paid on property upon the same '*principles established in regard to State taxation.*' Can it be conceived that the convention intended to provide that the incorporated towns of the State, in raising the money that should pay the salary of a mayor or of a tax collector, a sum amounting at most to a few thousand dollars, required they should do it by taxation, and that in levying such taxes all property should be taxed according to its value, upon the principles established in regard to State taxation, yet left these bodies free to adopt the principle of '*local assessment,*' and impose a burden of *a million and a half dollars* ($1,500,000) on a comparatively small body of owners of property on their leading streets? This would be to regulate and restrict a minor matter, and leave a far greater and more tremendous power of the same kind with no limitation whatever upon it. . . . The history of the introduction of this 29th section into our Constitution

[1] See same case, art. 2, sec. 17, p. 280; art. 7, sec. 4; art. 11, sec. 8.

will serve to strengthen the view we have taken, that is, that the entire taxing power was intended to be regulated. It had been held in Marr *v.* Enloe, 1 Yer., 452, that this power, being in its nature legislative, and an attribute of sovereignty, could not be delegated; that it could not more be done than could the power to enact laws be delegated. This decision was made on the Act of 1827, ch. 49, which enacted 'that the Court of Pleas and Quarterly Sessions in the several counties of this State, a majority of twenty of the acting justices being present, shall, at the first court in each year, levy a tax to meet the current expenses of their county for the ensuing year upon all polls and property subject to taxation.' This act was held to be void. The convention in 1834, to meet this decision made in 1830, inserted in the Constitution the 29th section, and authorized a delegation of this sovereign power to counties and incorporated towns, for corporation and county purposes, but imposed the same restrictions and limitations upon the exercise of the power that were imposed on the legislature in laying taxes for State purposes. And in this we have no question they intended to fasten these limitations of equality and taxation according to value on the counties and incorporated towns in precisely the same way, and to the same extent, as it had done on the legislature as to State purposes, that is, upon the entire power, and not upon it in one form, leaving another untouched and unrestrained. . . .

"We lay down the proposition that taxation, in the sense of the constitutional provisions, and in the form therein prescribed, being the legitimate and appropriate mode of providing revenue to discharge the general charges upon the State, and upon counties and corporations, that the implication is fair, and we think irresistible, that this means is imperatively demanded to be used, and imposed upon the government by the spirit and meaning of the Constitution, and must be resorted to, in all cases falling fairly within the range of what can be denominated burdens for State, county or corporation purposes, unless some other mode of meeting these burdens is provided in the Constitution, or fairly recognized by it. This, as a general principle, we take to be a sound and safe rule, and the one that more nearly than any other comports with the idea of a constitutional government, with limitations and restraints imposed by the people by organic law upon the action of their governmental agencies, of each and every kind, and in all departments of its machinery." **56**, 368.[1] *Taylor McBean & Co. v. Chandler et al.* 1872.

Rate of Levy.

Tax Levy in Excess of Rate Levied by the State—When Legal.—NICHOLSON, J.: "It is true, that in reference to taxation for some special objects outside of the usual and proper objects of the corporation, as in

[1] See same case, art. 2, sec. 28, p. 314.

secs. 491*c* and 1361, the restriction exists that the special taxes shall not exceed the rate of State taxation; but this restriction has no application to debts contracted in carrying out the ordinary and legitimate purposes of the corporation. As to these, the mayor and aldermen constitute the legislative representatives of the inhabitants of the town. They have the power to order such improvement or repairs in the street, as in their judgment are necessary and proper, for the comfort and convenience of their constituents, and to contract such debts therefor as may be proper, in their discretion, to accomplish the objects. To satisfy the debts so contracted they have ample power to levy and collect the necessary amount of taxes. The taxes so levied and collected require no special power, nor are they such special taxes as are subject to legislative restrictions.

"If, therefore, the annual assessment of taxes, at a rate equal to that of State taxation, should fail to raise an amount sufficient to satisfy debts contracted in the legitimate exercise of their power, such as opening or repairing streets, there is nothing in the statute laws which would prohibit the corporate authorities from making another assessment to pay such debts." **55**, 869. *Mayor etc. of Bristol v. Dixon et al.* 1875.

May Assess Property Higher Than the State—Uniform Rate.—FREEMAN, J., held: "The corporation might assess the property at a higher value than the value placed upon it by the State, if it be not assessed higher than its actual value, the Constitution providing that it shall be levied upon the same principle as the State tax, to wit: At its value, and maintaining uniformity." **76**, 636. *Fulgum v. Mayor etc. of Nashville.* 1881.

Taxing Stock in National Banks.

Conflict of Laws.—In this case SMITH, J., held: "The act of congress requires that States shall assess for taxation shares of stock in national banks, at the place where the bank is located, and not elsewhere. The law of this State, not assessing for taxation shares of stock in national banks at the places where the banks are located, is not in conformity with the act of congress; and so far as it purports to tax such stocks is void. The State not having taxed shares of stock in national banks located in the State, they are not taxable by the municipal corporation of Nashville."[1] **45**, 601. *Mayor etc. of Nashville v. Thomas et al.* 1868.

Act of Congress Considered in Connection With this Provision.—McFARLAND, J.: "It is perhaps not strictly accurate to say, as has been said in argument, that the power to impose this tax is derived from the act of congress. The power to impose taxes is a power inherent in the

[1] Overruling what was decided on this point in Union Bank *v.* The State. **17**, 500.

government in its sovereign capacity. The Constitution defines this power and gives general directions as to the manner of exercising it, and bank stocks are expressly enumerated in the Constitution as taxable. . . . We can not see any reason why congress would permit the State tax to be imposed, and at the same time exempt the stock from taxation for county and municipal purposes. If this species of property should bear its just proportion of State taxes, we can see no reason in principle why it should be exempted from its just proportion of municipal taxes. These banks are certainly as much interested in maintaining a city government and police regulations for their own protection, as the individual citizens, and should bear their just part of the burden of maintaining them, unless they are exempted by some positive law. Did congress intend by the act in question to exempt these stocks from taxation for municipal purposes? The language is, 'that nothing in this act shall be construed, etc., to prevent all the shares, etc., from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority.' We understand that the taxes imposed by the city authorities of Nashville are imposed 'under State authority'—as much so as the State taxes proper. This proviso in the act of congress was enacted with a view to the laws of the States, and to the fact that the cities and towns where the banks are usually located always maintain a city government by taxation; and we think it can not be maintained successfully that congress intended to exempt this stock from taxation for municipal purposes. The fact that the act contains also a proviso that nothing in it shall be construed to prevent real estate owned by such corporations from being taxed for State, county, or municipal purposes, as other real estate, sustains this view." 54, 401. [1]*McLaughlin v. Chadwell et al.* 1872.

Corporation Purposes.

Power of a Municipal Corporation to Take Stock in a Manufacturing Company—Corporate Purpose Incidentally Discussed.—After quoting from the Act of 1817, creating the corporation of Gallatin, McKINNEY, J., says: "Under the foregoing power 'to lay and collect taxes' the authority to issue the bonds in question is claimed. It is scarcely necessary to repeat the familiar principle that a corporation is the creature of the law, possessing no power or authority except such as is expressly granted by the charter, or as is necessarily implied. And the simple statement of this principle would seem to be sufficient for the decision of the question before us. No argument can be necessary to show that the authority to purchase stock in a manufacturing establishment, or to issue bonds for the payment thereof, can not be derived from the power

[1] See same case, art. 2, sec. 28, p. 317.

of taxation conferred by the charter. No doubt can be entertained as to the nature or extent of the power 'to lay and collect taxes,' contained in the charter.

"The existence of such a power in the corporation was indispensable as a means to the accomplishment of the end and object of its creation—the government and necessary police regulations of the town. The powers of a corporation, being the exercise of a delegated authority, are to be strictly construed; and this rule applies with greater force to the power of taxation, from its very nature and liability to abuse. In ascertaining the extent of the power 'to lay and collect taxes,' delegated to a corporation, we must look to the general powers specifically granted, and such as result from necessary implication, to the various objects contemplated by the charter, and the duties enjoined therein; and as far as the proper exercise of these powers and the accomplishment and performance of these various objects and duties may require, but no further, may the power to raise money by taxation be exercised under the charter. If it be desired to possess the power to any greater extent, or for any other purpose, a further delegation of the power must be sought from the legislature.

"This case does not require that we should go into the question, What is 'a corporation purpose' in the proper sense of our Constitution and laws?—a question certainly of no easy solution, and one that, generally speaking, may be answered more readily negatively than affirmatively. We are not, therefore, called upon to determine whether or not in the case before us, or in any supposable case, the purchase of stock in a 'cotton and woolen manufactory' is a 'corporation purpose.' It may be remarked, however, that if it were held to be so, it would be difficult, perhaps, to imagine any *speculation* that might not be so regarded.

"But, without intending to decide a question not properly arising upon the record, we simply determine that the authority attempted to be exercised in the present case, of subscribing for stock and issuing the bonds of the corporation in payment thereof, was wholly unauthorized by the charter. And hence it results that the bonds are utterly void. Being so, we think it clear that the complainants can not be compelled to accept them." **33**, 715. *Cook & Steadman v. Sumner Spinning Co.* 1854.

Power of Municipal Corporation to Subscribe for Stock in Railroad Corporation and to Issue Bonds and Levy Taxes for Payment Thereof—Railroad a Corporation Purpose.—This bill was filed on behalf of complainants to restrain the corporation of Nashville from issuing bonds for the purpose of raising money to pay for twenty thousand shares of stock subscribed to the Nashville & Chattanooga Railroad Company.

TURLEY, J.: "The town of Nashville was incorporated by an act of the legislature passed the 11th day of September, 1806, with such

powers delegated to the corporation as were then deemed meet and proper for its condition. . . . The Act of 1845 merely authorized the corporation to take stock in the railroad, without giving power to raise the money for its payment. We think that there is nothing unconstitutional in this provision of the statute. If the corporation had money, as it might well have, there can be no good reason why it should not be permitted to vest it in such stocks as might be supposed would be profitable. Individuals so vest their money, and why should not a corporation be permitted to do so? It has been the constant practice to permit private corporations to vest their money in stocks; why may not a public corporation be likewise authorized to do so? There is no reason against it. It is no argument against it to say that such investment is not a corporate purpose. Why is it not a corporate purpose? If a corporation have a surplus fund, is it not a corporate purpose to have it vested to the best advantage? Is it not for the benefit of the corporation, and, therefore, a corporate purpose, that this fund should be securely vested, and at the best profit? If it be, why may it not be vested in railroad stock, if the corporate authorities think it best? . . . But the Act of 1847 goes a step further than the Act of 1845, and, in addition to the power then given to subscribe for stock, authorizes the corporation to borrow money for that purpose, upon the faith of the corporation, by hypothecating its taxes, or, if to them it shall seem best, to issue bonds of the corporation for the whole or any part thereof.

"Now, it is contended that this statute authorizes an appropriation, by taxes, for this subscription of stock, and that this railroad is not a corporation purpose, and that, therefore, the legislature can not, under the provisions of the 29th section of the 2d article of our Constitution, authorize the corporation of Nashville to levy and collect taxes for the payment of liabilities created by this subscription. This presents a question not entirely free from difficulty, and is, indeed, the only one worthy of serious consideration in the case. . . . The reason why this clause was embraced in our Constitution those contemporaneous with its formation know to have been that doubts had been suggested by the highest judicial tribunal of the State as to whether the taxing power could be delegated by the legislature to the counties and to the incorporated towns, and the clause was intended to remove these doubts. It does nothing more, however, in enlarging the powers of the legislature than it is believed it possessed before upon this subject, and nothing more in restricting the exercise of the power, on the part of the counties and corporate towns, to taxation for county and corporate purposes than existed before. But, be this as it may, we think that the legislature most clearly has no power to delegate to a county or corporate town the power of levying taxes for any other than county or corporation purposes. And that if this Act of 1847 is to be considered as

an act conferring on the corporation of Nashville the power to tax its corporators for the purpose of paying for this subscription to the stock of the Nashville & Chattanooga Railroad, and that the erection of said road is not a corporate purpose of the town of Nashville, then the act is unconstitutional. . . .

"Perhaps I might divide corporate purposes into two classes—those which are direct, and those which are indirect. A direct corporate purpose might be styled to be one which, in its direct and immediate consequences, operates upon the interests of the corporation. Such would be all police regulations for the government of the town, the promotion of good order, the protection of its citizens from the lawless, the suppression of vice, the opening and preservation of highways, streets, and alleys, the erection of market-houses and hospitals, supplying the town with water, etc. An indirect corporate purpose might be styled to be one which does not, in its direct and immediate consequences, operate upon the corporators, but the beneficial effects of which are to be experienced in a remoter degree, and which have to be traced to their source before they can be duly comprehended and appreciated. Such are all facilities of canals, roads, the improvements of rivers by which their navigable use is extended, by all which the commercial interest of a town is increased and expanded by reason of the increased facilities of communication thus furnished, by means of which the wealth of its population, individually and collectively, is increased, with a consequent increase of the comforts and enjoyments of life.

"It is true that these improvements must have some connection with the corporate town, claiming them as corporate purposes, more direct than that which would result from the general increased prosperity of the country by reason of such improvements, made without a direct reference to, or in direct connection with, the town. That is, the improvement claimed to be a corporate purpose of the character under discussion, must have such relation to the town as to be the medium through which this prosperity is attained. It must begin or terminate at the town, or pass through or so near as to be capable of affecting its direct interests. It would seem to be an incontrovertible truth that a corporate town is deeply interested in the making of any road, or other means of transportation and travel whereby the facilities of its commerce are increased; and, if it be so interested, why shall it not become a corporation purpose to have them made? It would really seem almost useless to argue in favor of it. Is there anything illegal in it? Is there anything against good morals in it? Is there anything against public good in it? Surely not. A town is situated ten miles from a navigable stream; it is obvious that it must be a matter of great importance to the town, its commerce and general prosperity, to have a railroad or macadamized road to this river. It concerns no one else but this town,

and no one else will make it. Shall it not become a corporation purpose of this town to make it if it be able? Surely no one will deny but that it may. Distance can not change the principle. If it can become a corporation purpose to make the road ten miles, so it may, if like reason exist, and there be like ability, to make the road twenty, thirty, or any number of miles, there being no limit save the extent of the ability of the corporation and the discretion of the legislature in granting it the power.

"If a corporation may make the road, may it not join with others to make it? If the undertaking be too expensive to be carried into execution by the corporation itself, or if others be desirous of uniting with it for the effectuating of the design, why may they not unite? Again, it may be asked: Is there any wrong in this? Is there anything against the public good in this? Is there anything against law in this? Surely not. And if the majority of the corporators are desirous of doing this, and the legislature will grant them the privilege of doing it, upon what principle shall the minority interfere and prevent it? Minorities are protected against the illegal acts of majorities, but they must submit to those which are legal. . . . If the making of this road can be considered a corporation purpose, there is no pretense for holding the Act of 1847, which authorizes the corporation of Nashville to pay for its subscription to the road by a loan effected upon its credit, and a mortgage of its taxes, or by the issuance of the bonds for the same purpose, to be unconstitutional. And we are not able to comprehend why the making of this road should not be a corporate purpose of the town of Nashville as well as the making of a road running from the square to the waterworks above the town. The only distinction is that the one is longer than the other, and will cost more money; but this, as to principle, is a distinction, and not a difference. In this view of the case we are sustained by the decision of the Supreme court of Virginia, in the case of Goddin *v.* Crump, 8 Leigh, 120, and by the decision of the Supreme court of Connecticut, in the case of the City of Bridgeport *v.* Housatonic Railroad Company, 15 Conn., 475, in both of which cases the questions presented for the consideration of the court were the same in principle as those discussed in this case, and received the same determination.

"We then hold that the legislature of Tennessee had the constitutional power to authorize the corporation of Nashville to take stock in the Nashville & Chattanooga Railroad. That the making of this road is a legitimate corporate purpose of the corporation, and that it is legally authorized to pay for its subscription to the stock of said road in either of the modes pointed out by the Act of 1847."[1] **28**, 266. *Nichol v. Mayor etc. of Nashville.* 1848.

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[1] The following extract from the preliminary observations made by Judge TURLEY in delivering the above opinion are in point:

"In the State of Tennessee a corporation is the creature of the legislative department of the government; it exists solely and alone by virtue of its act of incorporation, and it can exercise

What is Corporation Purpose—No General Rule.—McKINNEY, J.: "Every attempt to lay down an exact general rule, by which to determine what is 'a corporation purpose,' must prove nugatory. The question must, necessarily, be decided in view of the facts of each particular case. And while we do not mean to say that the judgment of the local government of the town is to be taken as conclusive of the question whether the object proposed be a legitimate corporation purpose, yet, we think it might, in general, be safely taken as *prima facie* evidence of the fact; for it will perhaps be found, in most cases, that an intelligent board of aldermen are more capable of forming a correct judgment as to what measures are of a nature to promote, more or less directly, the general interests and prosperity of the town, than any other tribunal." 40, 322. [1]*McCallie v. Mayor etc. of Chattanooga.* 1859.

Waterworks, Gas Companies, Parks, Pest Houses, and Libraries, All Corporation Purposes.—NICHOLSON, J.: "The principle that governs in determining whether an appropriation is for a corporation purpose or not, may be clearly illustrated by reference to what a corporation may do in the preservation of health of its inhabitants. The preservation of health is universally conceded to be a legitimate corporation purpose. To carry out the power to preserve the health of a city, money may be appropriated to secure a constant supply of wholesome water; hence, waterworks outside of the city, from which good water may be conveyed into the city, may be erected and operated either in whole by the city or in connection with others. In like manner, it is now well understood that public parks in the vicinity of cities contribute essentially to the health and comfort of their inhabitants, and hence money may be legitimately appropriated for these purposes. So, likewise, as to the erection of hospitals and pest-houses outside of a city. The preservation of peace and order within the limits of a city, is a clear corporation purpose. To effect this object as well as for the comfort and convenience of the inhabitants in the night-time, the lighting of the streets is a proper object or corporation purpose; and if this can be done more cheaply or more efficiently by gas than by lights from oil in lamp posts,

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no powers but such as are expressly granted to it, and such as are the result of necessary and proper implication. This principle necessarily follows from the relation a corporation occupies to the State; it is not, as has been justly remarked in the argument of the case, a *regnum in regno*, but it is a thing created by legislative enactment, to which certain powers of action are given for trade, for manufacturing, for municipal government, for education, or for any other legitimate purpose for which a combination of capital, or of intellect, or of numbers, may be desired. Its whole action must necessarily be the result of the authority conferred upon it, which may be limited or extended as the legislature, in its wisdom, may think proper to strengthen or weaken it, by delegating or withholding those powers which are inherent in the State, or are only to be exercised by its individual citizens without a charter of incorporation. The powers of corporations being exercised, then, under delegated authority, are to be strictly construed. So are all delegated powers, whether they be of a private or public character; and if any one thinks that this principle is of modern discovery he is greatly mistaken. It was as well known to my Lord Coke and his successors in the common law as it has ever been to any expounder of the Constitution of the United States, and the principle is as well, if not better, established by the decisions of courts of England as it has been by the political debates at the hustings and in congress, or by the Supreme court of the United States."

[1] See same case, art. 1, sec. 20, p. 192.

it is within the legitimate province of the corporation to obtain gas from works located out of the city, either erected by the city corporation or by a gas company. In all these cases the appropriations are justified upon the principle that the object to be accomplished is a legitimate corporation purpose, and the means adopted for their accomplishment are the necessary and proper means for carrying them out." It was held in this case that an appropriation to purchase a library for the university was for a corporation purpose. Judges FREEMAN and MCFARLAND dissented. **65**, 173. *East Tennessee University v. Mayor etc. of Knoxville.* 1873.

Public Schools.—The establishment of public schools is also a corporation purpose. MCFARLAND, J., dissented. **55**, 850. *Waterhouse et al. v. Board etc. of Public Schools.* 1874.

Again Held that Public School is a Corporation Purpose.—COOPER, J.: "The point is made by the complainants that to establish and provide for a system of free public schools, is not a corporation purpose. It is a little curious that such a point should be made at this time, when a system of free public schools has been in operation, supported by municipal taxation, in several of the principle cities of this State for over a quarter of a century, and when, for at least twenty years, many of the counties of this State have been, under a general law, aiding the public schools by local taxation. . . . If any one thing can be considered settled by the common consent of the people, the legislature and the courts, it would seem to be the fact that secular education is a State purpose, and as such, subject to the control of the legislature, of the counties and the incorporated towns of the State as branches or arms of the State government. The authorities, our own among the number, are all one way." **83**, 639. [1]*Ballentine v. Mayor etc. of Pulaski.* 1885.

Civil Districts Not Incorporated Towns.

This Provision Inserted in the Constitution of 1834 and 1870 Because of the Opinion in the Case of Marr v. Enloe.—SMITH, J.: "The question proposed is not open in Tennessee. It was closed by the judgment of the Supreme court in 1830, and soon after again by the convention of 1834, which framed the present Constitution. The Constitution, by sec. 3, art. 2, ordains that 'the legislative authority of the State shall be vested in a general assembly, which shall consist of a senate and house of representatives, both dependent upon the people.' In the case of [2]Marr *v.* Enloe, decided in 1830, the question came before the Supreme court, and it was there held that the power of taxation is in its nature

[1] See same case, art. 1, sec. 8, p. 62; art. 2, sec. 2, p. 252; art. 2, sec. 17, p. 277; art. 2, sec. 28, p. 333; art. 11, sec. 8; art. 11, sec. 12.

[2] See ante, sec. 28, note, p. 332.

legislative, and is incapable of delegation. So essentially legislative is the power held to be, that it can no more be delegated than can be delegated the power to enact statutory laws. This decision was made upon the Act of 1827, ch. 49, sec. 1, which enacts 'that the Court of Pleas and Quarter Sessions, in the several counties in this State, a majority of twenty-five of the acting justices being present, shall, at the first court in each and every year, levy a tax to meet the current expenses of their county for the ensuing year upon all polls and property subject to taxation.' Upon the bench of the Supreme court, when this decision was made, were Robert Whyte, Catron, and Greene. The mention of their names carries with it great authority. It may be said, with a truth which will receive the assent of the enlightened lawyers of Tennessee, that these men, as much and probably more than any other of the judges who have adorned the past history of the Supreme court, laid the foundations of the jurisprudence of Tennessee, and gave to it the great measure it has of consistency, solidity, and truth.

"Four years after the decision of Marr *v.* Enloe the convention of 1834 was held. The decision was well known, and that the rule deduced by it was the constitutional law of the State. The convention had the power to abrogate the rule totally, or to subject it to partial modification. It chose the latter, and authorized the legislature to delegate the power of taxation to the counties and incorporated towns. This was done by the 29th section of the 2d article of the Constitution. The convention did not mean to go further. The implication is irresistible, that the expression of the authority to delegate the power to the counties and towns, is an absolute exclusion of the authority to delegate the power to any other agency. It is impossible to doubt that the convention designated the counties and incorporated towns, and authorized the power to be conferred on them, for the reason that, without such designation, the power of taxation would be restricted to the legislature only. The purpose of the 29th section was to authorize the legislature to confer the power of taxation on the counties and incorporated towns, and no other or further. . . . It is conceded on all hands that the civil districts of the counties are not, in the sense of the Constitution, incorporated towns, and that the fact that they are invested by the school law with some of the capacities of corporate bodies, does not make them incorporated towns. By no fair sense of the words, nor by no existing similitudes, nor by any possible construction of the Constitution, can the civil districts be held to be incorporated towns.

"Were the question original and unsettled, much weight would be due to the persuasive and powerful arguments of the counsel for defendants, drawn from a comparison of the Constitutions of 1796 and 1834; and from the principle that the legislative body is universal and absolute, except where expressly, or by cogent implication, limited by

constitutional restrictions, and from the duty enjoined upon the legislature by the Constitution to cherish and promote literature, science, and common education. Much weight, also, would be owing to the adverse judicial opinions of the courts of the sister States of the Union. But the decision of this court must be governed by the principles established by the law of Tennessee. Wisely or unwisely, and that is not for us to say, the constitutional law of Tennessee is that the taxing power is essentially legislative, and incapable of delegation to other than the counties and incorporated towns. And so we declare. And having no doubt that it is so, we hold that the fourteenth section of chapter 83 of the Act of March 14, 1868, and the tax assessed pursuant to it by the board of education of the twelfth civil district of Montgomery county, are unauthorized by the Constitution and void." ANDREWS, J., dissented. **46**, 129. *Kessee v. Civil District Board of Education et al.* 1868.

Levy of Tax by School Districts Unconstitutional—Proceedings in Convention of 1870—Case Criticised: Nichol v. Mayor etc. of Nashville—Distinct Departments of Government.—The question was the validity of that part of the Act of 1873 entitled "An Act to establish and maintain a uniform system of public schools in Tennessee," which conferred upon school districts power to levy and collect taxes for common school purposes. J. W. JUDD, Sp. J.: "An elementary principle of government in the States of our Federal Union is, that the whole sovereignty of the people rests with and is invested in the legislature, except so far as restricted by the powers delegated to the United States and by the constitutions of the States. This principle is earnestly invoked by the respondents, and they ingenuously argue that under it ample authority is found for the act in question. We have felt the full force of the argument, and do not by any means underrate its persuasive power, but it must be remembered that directly and inseparably linked with this is the further idea that our State government is, by the Constitution, divided into three separate and distinct departments—the legislative, executive, and judicial—and no person belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases directed and permitted. Art. 2, secs. 1, 2. And, further, that the people, having delegated to these three departments of government certain powers, have thereby deprived themselves of the right to exercise them; chief among which is the power delegated to the legislature of taxation. The power to levy and collect taxes is, by our Constitution, expressly delegated to the legislature, and the right to redelegate this authority must be found in the Constitution itself, or it does not exist. Guided by this postulate, let us examine the Constitution and see if authority can be found for the act in question, so far as it undertakes to delegate the power of taxation to the defendants in the manner and under the circumstances of this case.

"Defendants say such can be found in art. 11, sec. 8, art. 2, sec. 29, and art. 11, sec. 12. That part of the first named, which, by their argument, they apply, is as follows: 'No corporation shall be created, or its powers increased or diminished, by special laws, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter created,' etc. And section 12 provides that 'knowledge, learning and virtue being essential to the preservation of republican institutions, . . . it shall be the duty of the legislature, in all future periods of this government, to cherish literature and science.' There is certainly, in neither of these quotations, any power given to the legislature to delegate the high and most of all dangerous right of taxation, nor can we conceive how it can be said that to obey these mandates of the Constitution it is at all necessary that the legislature should delegate or take from itself the least right to levy and collect taxes. If it be answered that it is necessary in order to cherish knowledge, literature and science, to levy and collect taxes, then we reply, let the legislature do this as they are authorized to do. If it be said that the legislature has the power by general laws to create corporations, and if from this it is argued that therefore they have the right to empower such corporations to levy and collect taxes, and if the legislature, under this, can give the power to one it can to all, which, as we have said, involves an absurdity.

"But, conceding all this, the respondents ingenuously insist that by putting together that part of sec. 8, art. 11, above quoted, and sec. 29 of art. 2, which says that 'the general assembly shall have power to authorize the several counties and incorporated towns of this State to impose taxes for county and corporation purposes respectively as shall be prescribed by law,' that this gives the legislature the power, first, to create corporations by general laws and call them incorporated towns, and then possess them with the power to levy and collect taxes for corporation purposes; therefore, they conclude the act in question is constitutional and valid. The fault with this argument is that it assumes too much. By the same line of reasoning, the legislature could create incorporated towns out of the whole territory of the State by subdividing it into parts, and thus delegate to them the whole power of taxation and of government, and divest itself of the exact duty and responsibility entrusted to it by the people in the Constitution. Can it be for one moment believed that the people would have ever ratified our Constitution by their votes, if they had dreamed that such a construction as this would be put upon it? Hardly. Every step in the many directions only makes the succeeding one more easy and disastrous, and the writer of this opinion must be permitted to say for himself that he has never been able to give his assent to the judgment of the court in the case of Nichol *v.* Mayor and Aldermen of Nashville, 9 Hum., 252, and

other decisions of like kind, and since the result has been such as to bring about the worst financial results to our people, this court will not even extend those decisions, unless bound to do so by our solemn oath to the Constitution.

"The power to authorize incorporated towns and counties to levy taxes for corporation and county purposes, is the only part of our Constitution which we can find that gives the legislature any power to delegate the right of taxation. This clause appeared for the first time in the Constitution of 1834, and was copied in that of 1870. It is a sufficient fact, that in the constitutional convention of 1870, when art. 2, sec. 29, was under consideration, Mr. Seay offered an amendment to insert 'civil districts' after the word 'counties,' so as to give the legislature power to authorize the civil districts to levy and collect taxes, but the amendment offered was at once rejected. All the authorities, as well as common sense, agree in the rule that language must be interpreted in the light of things surrounding the parties using the words to be interpreted. When the Constitution of 1834 was framed and ratified, there was no such thing in this State as an incorporated town other than one of fixed and defined limits, invested with powers of municipal government, and this for local and police purposes. Such was the condition of things in 1870, and such alone is the sense in which the 'incorporated towns' were used, and to this it must be confined. Much authority is cited from other States, which it is assumed holds a different doctrine from this, to which we reply, if that be so we prefer to read our Constitution as that of the State of Tennessee. In all that part of the act in question quoted above, the word 'town' is used only once, and that in the forty-fifth section, where it is said they 'shall be incorporated towns.' After this, and in all other places, they are called districts, and school districts, and they are districts, being the same as the civil districts theretofore existing in Bedford county; and if it can be held that the legislature, by simply calling them incorporated towns, can invest them with the power of taxation for school purposes, it can be done certainly for all purposes—a conclusion to which we can not assent." The part of the act referred to was declared unconstitutional. **69**, 549. *Lipscomb v. Dean.* 1878.

Taxation of Privileges.

By-law of a Town in Conflict with Constitution and Laws of the State.—GREEN, J., held: "The by-law of a town, prohibiting all persons from retailing spirituous liquors within the limits of the corporation, under a money penalty, unless the person obtain a license from the corporate authorities by the payment of a fixed sum, is in conflict with the Constitution and laws of the State permitting persons who might obtain license as prescribed by those laws to retail spirituous liquors, and

therefore void, and can not be enforced even against a person who has no license from the State." 20, 156. *Robinson v. Mayor etc. of Franklin.* 1839.

Difference Between Privileges and Property.—McKINNEY, J.: "It must be borne in the mind, that, in regard to the power of taxation delegated to the legislature, an important and fundamental discrimination is made between property and privileges, by the Constitution. The rule laid down as to the former, is, that 'all property shall be taxed according to its value,' and no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.' But the rule, as to privileges, is the discretion of the legislature; the latter are to be taxed in such manner as may, from time to time, be directed by the legislature. It will be observed, too, that the twenty-ninth section, which authorizes a delegation of the power of taxation to incorporated towns, for corporation purposes, is very broad in its terms; it does not mention 'privileges' at all; property alone is embraced, and in reference to that, the only restriction is, that the principle established in regard to State taxation shall be observed by corporations. But in respect to privileges, the corporation is left to the exercise of a sound discretion in imposing a tax thereon, unless restricted by the legislature, in the charter of incorporation, or by some general law of the State." 39, 365. *Adams v. Mayor etc. of Somerville.* 1859.

Power to Impose this Tax on Retail Liquor Dealers.—GREEN, J.: "The charter of the corporation of Columbia, October, 1817, ch. 143, sec. 2, expressly confers the power on the corporation to lay and collect taxes. The Constitution, art. 2, sec. 28, empowers the legislature to tax privileges in such manner as they from time to time may direct. By the Act of 1835, ch. 13, sec. 4, retailing spirituous liquors is made a 'privilege,' and taxed as such.

"There is no question, then, but that the corporation had the right to tax tippling houses to some extent. The law to lay this tax, if it exist at all, must be drawn from the direct taxing power conferred in the charter. It can not be derived from the power to regulate and restrain tippling houses. That must be done by such ordinances as will prevent these houses from becoming disorderly, and imposing penalties for the infraction of such laws. The taxing power could only have been exercised in reference to this trade as a lawful occupation, affording to the persons who follow it a profit which would make it proper they should pay a tax for the privilege. By the twenty-eighth section of the second article of the Constitution it is provided that all property shall be taxed according to its value, and that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but the legislature may tax privi-

leges as they may from time to time direct. The twenty-ninth section of the same article provides that counties and corporations 'shall tax property according to its value, upon the principles established in regard to State taxation.' Nothing is said in this section in regard to privileges, and, therefore, they are left, in regard to them, to the exercise of a sound discretion. It would be safe to conform the exercise of this power to the principles established in regard to State taxation, and to tax privileges in the proportion they pay to the State. But a want of exact conformity in this respect would not make the tax void, for the legislature may tax privileges in what proportion they choose, and so may corporations, provided the inequality be not such as to make it oppressive on a particular class of the community. A by-law for oppression is void. Angel & Ames, 184." 20, 240. *Mayor etc. of Columbia v. Beazley.* 1839.

Privileges, How Created—Livery Stable.—Question: Did plaintiff have the right to tax the keeping of a livery stable as a privilege? CARUTHERS, J.: "It is a power of the legislature alone to create privileges and forbid their exercise without license. They have made the keeping of a tippling house, a race track, etc., privileges, but not livery stables. Until this is done by the law-making power, that occupation can not be taxed, as such, any more than the keeping of a blacksmith shop, or a lawyer's or doctor's office. This power of creating privileges has not (even if it could be) been delegated to this municipal corporation." 40, 414. *Mayor etc. of Columbia v. Guest.* 1859.

Power to Tax Mercantile Privileges—Partial Legislation.—ANDREWS, J.: "There can be no doubt as to the right of the municipal authorities of the city of Nashville to impose a reasonable tax upon the mercantile privilege within the corporate limits. And such tax need not be imposed in the precise mode adopted by the legislature in regard to State taxation. But the authority conferred upon the municipal authorities of Nashville can not enable them to create a privilege for the purpose of taxing it, or to discriminate between persons exercising the same privilege by imposing a tax upon one class at a higher rate in a different mode, or upon other principles than are applied to the exercise of the same privilege by others. Their power to tax privileges goes no further than the delegation in their charter; and any attempt to impose other or heavier burdens upon a portion of those exercising the same privilege than are imposed upon the others would be void, as being beyond their granted powers, and as an exercise of partial legislation." 45, 558. *Mayor etc. of Nashville v. Althrop.* 1868.

Imposing Privilege Tax on National Banks.—NICHOLSON, J.: "We think it manifest that it was not the intention of the legislature to subject the national banks to taxation for the exercise of the privilege. To

constitute a privilege the occupation or business transactions must be such that the legislature could forbid it to be pursued or done, and which could only be pursued or done under license issued by the authority of the State. The national banks are authorized to pursue their banking business by virtue of acts of congress. As the legislature has no power to prohibit the exercise of the privilege so conferred by congress, it would seem clear that it was not in their contemplation to include national banks among the privileges to be taxed." **55**, 815. *National Bank of Chattanooga v. Mayor etc. of Chattanooga.* 1875.

Regulation of Interstate Commerce—Privilege Tax on Drummers—Act of 1881, Ch. 96, Sec. 16.—BRADLEY, J., held: "The power of congress to regulate interstate commerce is exclusive when its subjects are national in character, or admit only of one uniform system or plan of regulation. Where its power is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from any restriction or impositions. A State can not levy a tax or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. Such commerce is not subject to State taxation, even though there be no discrimination between it and domestic commerce."[1] Judges WAITE, FIELD and GRAY dissented. **120** U. S. 489–502. *Robinson v. Taxing District of Shelby County.* 1887.

Municipal Regulations.

Corporation Must Determine What Restrictions Upon Trade are for the Public Good.—An ordinance made it an unlawful offense, punishable by fine, to keep open a saloon after a certain hour. CARUTHERS, J.: "It is a correct principle that a corporation can pass no by-laws inconsistent with the Constitution and laws of the State. Ang. & Ames on Corp., 182–188. A by-law must also be reasonable, and not oppressive. Same, and 2 Kent's Com., 296; Mayor and Aldermen of Columbia *v.* Beazley. Subject to the restrictions and limitations, the power to make by-laws abides in all municipal corporations, and may be enforced by penalties. In the ordinance under consideration we see nothing oppressive or violative of the Constitution or laws of the State. The license privilege is not prohibited, but regulated in its exercise by a reasonable and proper restriction. It must be left to the corporate authorities to determine what restrictions upon this trade are required for the general good, and unless they are unreasonable and oppressive, they are valid and will be

[1] Reversing the judgment of the Tennessee Supreme Court, reported in **81**, Tenn., 303.

maintained. No man can be permitted to exercise or use any of his rights to the unnecessary injury of others, and much less whole communities." 40, 247. *Smith et al. v. Mayor etc. of Knoxville.* 1859.

Sabbath Day—State May Compel Observance of—May Empower Municipal Corporations to do the Same.—COOKE, Sp. J.: "The question as to the power of the State to compel by penal enactments the observance of the Sabbath day, so far as cessation from secular pursuits is concerned, and to punish its open violation, as well as the power of the legislature to confer the same authority upon municipal corporations, has not been seriously questioned by the very able and learned counsel who have argued the cases for the defense, and is too well settled in our jurisprudence to admit of question or to require discussion." 80, 502. *Mayor etc. of Nashville v. Linck.* 1883.

Sidewalk Laws.

Assessment for Cost of Constructing Sidewalk Not a Tax—Not Unequal—Not Oppressive—Public Benefit.—The municipality of Franklin passed an ordinance, in pursuance of express legislative authority conferred by charter, requiring each owner of a lot on a given street to construct a foot pavement in front of his lot. The plaintiff in error, a lot owner, failing to make the pavement as required by the ordinance, after having been notified to do so, the high constable of the town proceeded to construct the pavement as required, at a cost of $75, which was paid by the corporation, and to recover which this action is brought. A verdict and judgment were rendered against Maberry in the Circuit court, and he appealed to this court.

GREEN, J.: "It is now contended that this ordinance is in the nature of a tax levied on the owners of lots, and, as such, that it is unconstitutional, because it is unequal. We do not think that this law levies a tax. A tax is a sum which is required to be paid by the citizens annually for revenue for public purposes. But this ordinance levies no sum of money to be paid by the citizens. It requires a duty to be performed for the well-being and comfort of the citizens of the town. It is in the nature of a nuisance to be removed. And if an ordinance were to require that each owner of a lot in town should remove nuisances from his lot, and on failure to do so the town constable should remove the nuisance, and the party should pay the expense of the work, it would hardly be suggested that the expense so incurred would be a tax. And yet such a case is in principle analogous to the one before us. The ordinance in question is, therefore, not unconstitutional on the ground of being an unequal tax.

"But it is said that this ordinance is unequal in its operation, oppressive in its requirements, and therefore void. It appears from the evidence that several adjacent lots were worth, with improvements, from

$2,500 to $1,000, and that the lot in question was unimproved, and worth only $400. It was also proved that the pavement enhanced the value of the lot, but that the increased value was not equal to the cost of the pavement. Upon these facts we do not think this ordinance oppressive, and for that reason void. The duty required to be performed, although of some advantage to all other inhabitants of the town, is also of peculiar benefit to the party who is the owner of the lot. The evidence is that the street near the lot in question was uneven, and in wet weather very muddy and disagreeable to pass. A sidewalk well paved would therefore add greatly to the comfort of all who might pass that way, and the owners of the lots would share largely in the advantages it would afford. The ordinance is general in its character, operating on all persons owning property on the particular street designated. The plaintiff in error derived a benefit from the operation of the law, not only in the comfort his own pavement afforded, but from the pavements made by other persons who owned lots in the town. The fact that these pavements exist must add to the value of property in that town, and in the general appreciation of property the plaintiff in error will derive a proportional advantage. But it is said that this lot is unimproved, and is of much less value than the improved lots, the pavement in front of which cost more than the one in question, and that for this inequality the ordinance is void. It may be replied that lots in a town are valuable only because they are convenient sites for the erection of buildings or other improvements; and should the plaintiff in error construct improvements as valuable as those on the lots of his neighbors, the inequality of this burden would cease. Besides, perfect equality of burdens can not be attained in public regulations. If the corporation law had required that every man in the town should labor a given number of days in repairing the streets, no one would imagine such law void for inequality and oppression; and yet in that case the inequality of burden would be the same in principle as that here complained of, for these pavements might have been constructed by the labor of the citizens so exacted. Does it follow that, because one man's lot may be less improved, and therefore less valuable than that of another, he is less benefited by the construction of streets and sidewalks? Not at all. On the contrary, the reverse may be the fact. He whose lot is least valuable may, from the peculiar circumstances of his family, derive much more benefit from such means of comfortable passage through the town than his more wealthy neighbors. Mere inequality in the value of lots does not, therefore, establish the proposition that, in making the pavements of equal extent, the burdens were unequal. We think, then, there is no such inequality in the case before us as to constitute such oppression as must exist before a corporation law is void for that cause." **25**, 373. *Mayor etc. of Franklin v. Maberry.* 1845.

Ordinances Requiring Owners of Lots to Lay Sidewalks Not in the Exercise of Taxing Power—Not Taking Private Property for Public Use—Principles Upon Which They are Upheld.—Washington was served with notice to lay a sidewalk in front of his lot. He failed to do it. The city then laid the pavement, sued Washington, got judgment, and he appealed. GREEN, J.: "It is now insisted that the act of the legislature giving the corporation authority to make the by-law under which this proceeding is had is unconstitutional, and of no force and validity. This question has heretofore been before the court in the case of Maberry *v.* The Corporation of the Town of Franklin, and it was held in that case to be within the legislative competency to enact such law. We have heard nothing advanced to shake our confidence in the correctness of the judgment in that case. To require the owners of town lots to construct pavements along their sidewalks is not the exercise of the taxing power, nor is it the taking of private property for public use. Upon these two subjects there are express provisions in the Constitution restraining the exercise of legislative discretion. But the provision in question requires the owners of property in the city to contribute their labor towards the construction of pavements for the common good of the community where their property is situated, whereby the general interest is promoted, and the property thus owned is greatly enhanced in value. It is the exercise of precisely the same description of power that is employed in requiring the inhabitants of a county to labor in the opening and keeping in repair the public roads. This is not denied; but the argument questions the exercise by the legislature of such power, and demands a principle to be stated upon which it can rest for support.

"It would be sufficient to reply that the Constitution contains no prohibition of the exercise of such power, and that, as the legislature is as omnipotent as the British Parliament, except where there is a negative in the Constitution on its power, express or implied, it follows that the power may be exercised, unless its exercise is so unjust and oppressive as for that reason to be of no force. And counsel puts the argument to negative the existence of this power on the ground that it is unequal, and therefore unjust and oppressive. It is certainly true that perfect equality is not attained by the operation of this law; but it may be said with equal truth that such equality of public burdens can not be attained by any device that the wit of man has ever yet suggested.

"If a fund be raised by taxation for constructing roads in the county, or streets and sidewalks in the town, it is certain that equality of burdens in proportion to the benefits enjoyed will not be attained. Take our mode of taxation for example. A merchant may have a large stock of goods, and may own no lots in town. You raise a tax to improve the streets and sidewalks. The merchants will pay the larger share of the taxes, but the owners of the lots will reap the advantage

almost exclusively in the appreciation of the value of their estates. Here would be a gross inequality. It would be taking the money out of the pockets of one class of citizens with which to improve the property of another class. It is true there will not be exact equality of burdens among the owners of lots if each is compelled to construct a side pavement in front of his lot. And this condition constituted a strong ground in Maberry's case for insisting that the law was oppressive. But in the case before us no such inequality exists against the defendant. His lot is of great value, and if the owners of real estate in the city were taxed to make these improvements the defendant would doubtless be compelled to pay, in such taxes, a greater sum than the pavement of his sidewalks have cost. Perhaps it might be otherwise if merchants in the city were taxed in the proportion they pay into the State treasury. But we have seen how unequal and oppressive on them such a tax would be. This law is general; it operates alike on all, and is not, in our opinion, so unequal as for that reason to be of no force.

"The principle upon which this power of legislation is exercised is that plain and universal one — indispensable in the administration of government—that the public have a right to the contributions of the money and personal service of all its citizens whenever the public interests and exigencies may demand it, in consideration of the protection it affords to life, liberty, reputation and property. Those benefits conferred by government entitles it, as a matter of principle as well as from the necessity of the case, to any service its exigencies may demand, and to the employment of the property of the citizens in any way that may be necessary for the public good and which is not forbidden in the Constitution.

"It is upon this principle a militia man is compelled to serve in the army or to patrol in his neighborhood. But these services are not resisted on the ground that every other man does not perform equal service. Nor upon the ground that the party has no friends or property to protect, while others, who have not been called on, and may not be needed, have thousands of property and numerous families. Indeed, we can scarcely find, in the exercise of the sovereign authority, any subject, in relation to which public burdens are imposed, in which there is very much nearer approach to equality than exists in the operation of the law in question. We therefore think it is constitutional, and conferred on the corporation power to make the by-law in question."[1] **31**, 180. *Washington v. Mayor etc. of Nashville.* 1851.

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[1] In the case of Taylor, McBean & Co. *v.* Chandler et al., **56**, 377, Judge FREEMAN says of the two opinions above quoted: "If the question was an original question, we should not be disposed to agree with the proposition thus laid down. We think it was *straining* the principle very far, to hold, that *an improvement*, such as *a sidewalk*, can be included under the idea of '*a nuisance to be removed.*' It is certainly more *in the nature of an erection of a needed improvement for the comfort and convenience* of the citizens of the town, than *the removal of that which is noxious and hurtful* to the citizens of the town. We do not feel inclined, however, to disturb that decision, when confined to the precise state of facts to which it was applied in that case. . . . Judge

Notice to Lot Owner—By Ordinance or by Some Officer or Employee—Delegation of this Power—When Legal and when Not—Construction of Charter.—McKINNEY, J., after reaffirming the principles announced in the two cases above, said: "The remaining question is whether, in the present case, the power conferred upon the corporation has been exercised in conformity with the law of its creation. The power to charge the owner with the cost of a pavement made by the corporation is restricted not only by the terms of the act of incorporation, but likewise by the very purpose for which it was bestowed. The provision of the statute is, 'that if the owner or owners of lots shall fail to comply with the provisions of such by-laws *within such time as may be prescribed thereby*, the corporation may contract,' etc. By this provision no *notice* is contemplated other than that to be conveyed by the promulgation of a general law of the corporation, applicable to and operating upon all owners of lots within the limits of the corporation, requiring foot pavements to be made, and prescribing the time within which they shall be made. Such a law, thus promulgated, is notice, of itself, to all lot owners within the corporation, and, if reasonable in its terms, must be complied with by all at their peril. The by-law under consideration, requiring pavements to be made by the owners, does not prescribe any time within which such pavements shall be constructed, but, as a substitute for this requirement of the charter, enacts that, if the owner or owners of lots shall fail to comply with the provisions of the by-law, *after thirty days' notice*, the chairman of the street committee may contract, etc. As to the manner of giving such notice, or by whom it shall be given, the by-law is perfectly silent; but the practical construction and operation of the law is, as it seems, that the chairman of the street committee, without any order or resolution of the board of mayor and aldermen, either general or special, gives the notice to particular individuals in default. In other words, the notice, instead of emanating from the board of mayor and aldermen, as a general requirement, approved by the judgment and discretion of the persons in whom, by the charter, the power and trust are confided, it proceeds, as it would seem, from an irresponsible individual, unknown to the charter, and upon whom even the by-law confers no such authority.

"This is an exercise of the power conferred upon the corporation wholly unwarranted by the act of incorporation. We do not say that it was not competent for the corporation, instead of prescribing a time in the by-law for making pavements, to provide that they should be made upon reasonable notice; but then some further specific action of

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Green saw clearly that the imposition must be put *outside of the taxing power*, or else it could not be maintained. While we do not disturb these decisions, we hold, *that they are to be limited strictly to the precise facts on which they are made*, and that to carry them so far beyond these facts as to cover and include an exaction or burden of the magnitude involved in the case now under discussion would be not only to do violence to their letter, but we have no doubt would be to carry them much farther than the learned court ever conceived they would be attempted to be carried or applied."

the corporation would become indispensable, directing that such notice should be given, and in what manner. If the corporation ever possessed the power to delegate to an individual member or members the authority to determine what particular owners of lots should be required to construct pavements, and to give notice accordingly, it might suffice to say that this has not been done by the law under consideration. But we do not admit that the corporation possesses any such power. It can admit, no doubt, that an ordinance or by-law of the corporation, requiring particular individuals, by name, to construct pavements in front of their lots, passing by others who had omitted to do so, would be a nullity. Such an enactment would be partial, oppressive, and wholly unauthorized. And if this could not be done directly, it can not be done indirectly, in the manner attempted in the case before us. The power conferred upon the corporation is in trust for the benefit of all the citizens of the town, and must be exercised with discretion; and it must be exercised by the persons upon whom, by the act of incorporation, it is conferred—by themselves or under their express directions, as in other cases of personal confidence and trust, when judgment and discretion are required or relied on. Ang. & Ames on Corp., 346, 257. By-laws must be reasonable, and all such as are unequal, oppressive or manifestly unjust are void. Id. 347. And whether a by-law is reasonable or not is a question for the determination of the court. Id. 357. It is unquestionably true that, in addition to the incidental powers and capacities tacitly conferred by law upon a corporation, there may also be implied powers, in order to carry into effect the powers expressly granted, or to effect the purpose of its creation; but when the corporation is endowed, by its charter, with power to make a specific by-law in a certain case, and for a certain purpose, its power of legislation is restricted to the case and object specified, and all others being excluded by implication. Id. 323. Here the power imparted to the corporation, and the manner of its exercise, are expressly defined in the statute and must be strictly pursued." **32**, 370. *White v. Mayor etc. of Nashville.* 1852.

Charge for Constructing Sidewalk May be Declared Lien on Property —Act of March 17, 1875.—TURNEY, J.: "Except as to the matter of the lien, these several questions are determined against the defendant in the cases Mayor and Aldermen *v.* Maberry, Washington *v.* Mayor and Aldermen of Nashville. The question of the power of the legislature to authorize the making of the walks or pavements, and a charge therefor, being settled, the power to declare a lien upon the property for such charge follows, as of course the one power is an incident to the other, and naturally attaches to it. If the legislature may provide for the creation of a debt, it may also provide for its security or payment. If it may charge the owner of the property, it may charge the property itself as well. It is argued,

however, the case of Taylor, McBean & Co. *v.* Chandler et al., known as the Memphis Nicholson Pavement Case, overrules the case cited. A reference to the last-named opinion will show that the cases cited were criticised, and in terms admitted to have been properly decided. Besides, there is a wide difference between the cases on their merits. The ordinance pursuing the legislative grant requires a duty to be performed for the benefit, health, well-being and comfort of the citizens of Nashville, including the owner of the property. The pavement adds to the convenience and comfort of all who pass that way, the owner of the lot sharing largely in the advantage afforded, and devising an additional advantage in the appreciation of the value of his property, still further increased by other walks and pavements made in front of other lots in that part of the city. It is for the benefit of all the citizens that such grants are made to the city authorities, and it is only so long as they are confined to benefits that the law will allow of them. When they cease to be exercised for the benefit and comfort of the citizen, and to promote the welfare of the community, and become oppressive and unreasonable, destroying the value of property to the owner, or as is the 9th Heiskel case, appropriating the entire value of the property, and in some instances more, then they pass without the spirit and purpose and authority of the Constitution, and are void. The Constitution is intended to protect, not to destroy; to prosper, not oppress, the citizen. The case before us is one in which the enforcement of the statute and ordinance benefits the entire community and each citizen." Tenn. Leg. Rep., vol. 2, p. 26. *Mayor etc. of Nashville v. Berry.* 1877.

TAXATION OF HOME MANUFACTURES.

ART. 2, SEC. 30. No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees.[1]
[Same as Const. 1834, art. 2, sec. 30; Const. 1796, art. 1, sec. 27.]

Object of This Provision to Encourage Manufactures—Liability of Merchant to Pay Privilege Tax for Selling Articles Manufactured in This State—Art. 2, Sec. 28.—CARUTHERS, J.: "This agreed case, between the clerk of the County court of Henry county, on the part of the State, and the defendants, who are merchants in that county, raises the question of the liability of a merchant to pay a tax for selling things manufactured in this State. The statute[2] is, that 'salt, sugar, coffee, spun cotton, garden seeds, iron, and articles manufactured in this State, may be sold without paying a tax; but these articles are not exempt in the hands of any person who sets himself up as a merchant or grocer.' . . . In this exercise of this power the legislature at one time taxed

[1] See Kelley *v.* Dwyer, art. 2, sec. 28, p. 326; also 32, 355. [2] Code 1858, 545.

the merchant a specific sum for the privilege of selling merchandise, without regard to the extent of his business; but afterwards the more just and equitable mode was adopted, to graduate the amount of the tax by the quantity of goods sold. And the question made in this case is whether, in this estimate of sales made by them, iron, castings, spun cotton, and other things manufactured in this State must be included, and in that way enhance the amount of the tax to be paid by them. This involves the construction of the section of the Constitution above cited. The power to tax merchants in such manner as they may think proper is expressly given in section 28, and they have 'directed' that the 'manner' shall be to settle the amount to be paid by the extent of their business, or the quantity of goods, wares, and merchandise sold in each year, including things made or produced in this State. Is this prohibited by section 30? We think not. This is not a tax upon the article, but the occupation of the merchant. There would have been question if the old mode of taxing the occupation of the merchant a gross sum had been continued. But what difference can it make? The change is only as to the 'manner' of settling the amount to be paid for the privilege. It is not the article which is taxed, but the occupation or privilege.

"The legislature may tax a man's land, slaves, plate, jewelry, stocks, and almost every other kind of property, but not his flour, tobacco, cotton, iron, etc., 'otherwise than to pay inspection fees,' when there are laws requiring or allowing inspection of such products, as was once, if not now, the case, in this State, as to tobacco, flour, and other articles to be exported. This exemption was intended to encourage domestic manufactures and stimulate production. It is a wise prohibition. The legislature, in this case, have not attempted to violate or evade it. They have not only refrained from taxing such articles, but saved the producer or manufacturer from any tax for the privilege of selling them. But when the reason of that protection fails, and they become articles of merchandise and profit in the hands of a merchant by occupation, they direct that reference shall be had to them as well as foreign articles in estimating the amount to be paid for exercising the occupation or privilege of a merchant. There would be a great absurdity in any other construction. If a merchant got his iron or cotton yarns on one side of the State line, they would be taken into the account, but if in sight, on his own side, they would not be, according to the doctrine contended for. But it is enough to say that we think the legislature were not prohibited by the Constitution from providing that, in ascertaining the amount of tax to be paid by 'merchants' for the exercise of their privilege, the articles in question should be included; that not being a tax upon the article in the sense of the Constitution (sec. 30), but upon the occupation, under sec. 28." **39**, 462. *The State v. Crawford McNeil & Co.* 1859.

Privilege Tax—Residents and Non-Residents—Our Statutes do Not Attempt to Regulate Interstate Commerce—Art. 2, Sec. 28—U. S. Constitution.—"By the Act of 1878, ch. 79, sec. 4, all peddlers of sewing machines or selling by sample were taxed. By an act passed March 25, 1875, 'articles manufactured of the produce of the State are exempt from taxation.' The plaintiff in error manufactures its machines at Bridgeport, Conn., and have their principal office in Tennessee, at Nashville. It paid its tax for 1876 for peddling in Sumner county under protest, etc., and brings this action to recover back the amount so paid." It was argued that art. 2, secs. 28 and 30, of the Constitution of this State, were repugnant to secs. 8 and 10 of the Constitution of the United States, regulating commerce between the States.

TURNEY, J.: "Our statute is comprehensive, and applies to the resident as well as the non-resident—to home manufacturers as well as to the importer of foreign goods or goods manufactured out of and not of the growth or produce of the State. It is not an attempt to regulate commerce between the State of Tennessee and a sister State, nor is it an attempt to lay imposts or duties on imports or exports; but broadly levies a tax upon all peddlers of sewing machines without regard to place of growth, or produce of material, or of manufacture. Again, while our Constitution ordains that no article manufactured of the produce of the State shall be taxed otherwise than to pay inspection fees, it also ordains, as we have already noticed, that the legislature shall have power to tax merchants, peddlers, and privileges, etc. The two clauses must be construed *pari passu*, and effect given to each. Construing them together it clearly appears the convention took and expressed a distinction between a tax upon the article in specie and a tax upon the *privilege* of *peddling* the article, and conferred upon the legislature the power of enabling the enforcement of such distinction." 68, 519. *Howe Machine Co. v. Cage, Clerk.* 1876.

Wine Dealers—Privilege Tax—Who Liable For.—LURTON, J., held: "The Act of 1885, ch. 5 (extra session), imposing a privilege tax on all liquor dealers, wholesale and retail, '*except manufacturers who sell to be sold again*,' renders one liable for the tax therein laid who sells, to consumers, wine manufactured out of grapes produced in this State by the manufacturer; and this act is constitutional." In delivering the opinion, he said that this and section 28 "must be construed together. Section 30, it will be observed, only prohibits taxation upon the *article* manufactured of the produce of this State. A tangible and substantial benefit is secured to such manufacturer in his exemption from any direct tax upon such articles as property while in his hands. Section 30 does not inhibit the laying of a privilege tax upon the occupation of selling such articles. The power to tax privileges in such manner as the legislature may direct will undoubtedly authorize the legislature to

lay upon all who sell liquor a privilege tax—a tax upon the occupation and not upon the article. This has been the uniform construction of these sections since the Constitution of 1834." 86, 135. *Kurth v. The State.* 1887.

ART. 2, SEC. 31. The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation, or municipality; nor shall the State become the owner in whole or in part of any bank, or a stockholder with others in any association, company, corporation, or municipality.

ART. 2, SEC. 32. No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by congress to the several States, unless such convention or general assembly shall have been elected after such amendment is submitted.

ART. 2, SEC. 33. No bonds of the State shall be issued to any railroad company which at the time of its application for the same shall be in default in paying the interest upon the State bonds previously loaned to it, or that shall hereafter and before such application, sell or absolutely dispose of any State bonds loaned to it, for less than par.

ARTICLE III.

THE EXECUTIVE DEPARTMENT.

ARTICLE 3, SECTION 1. The supreme executive power of this State shall be vested in a governor. [Same as Const. 1834, art. 3, sec. 1; Const. 1796, art. 2, sec. 1.]

ART. 3, SEC. 2. The governor shall be chosen by the electors of the members of the general assembly, at the time and places where they shall respectively vote for the members thereof. The returns of every election for governor shall be sealed up and transmitted to the seat of government by the returning officers, directed to the speaker of the senate, who shall open and publish them in the presence of a majority of the members of each house of the general assembly. The person having the highest number of votes shall be governor; but if two or more shall be equal and highest in votes, one of them shall be chosen governor by joint vote of both houses of the general assembly. Contested elections for governor shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law. [Same as Const. 1834, art. 3, sec. 2; Const. 1796, art. 2, sec. 2.]

ART. 3, SEC. 3. He shall be at least thirty years of age, shall be a citizen of the United States, and shall have been a citizen of this State seven years next before his election. [Same as Const. 1834, art. 3, sec. 3.]

[Const. 1796, Art. 2, Sec. 3. "He shall be at least twenty-five years of age, and possess a freehold estate of five hundred acres of land, and have been a citizen or inhabitant of this State four years next before his election, unless he shall have been absent on the public business of the United States or of this State."]

ART. 3, SEC. 4. The governor shall hold his office for two years, and until his successor shall be elected and qualified. He shall not be eligible more than six years in any term of eight. [Same as Const. 1834, art. 3, sec. 4; Const. 1796, art. 2, sec. 4.]

POWER TO CALL OUT THE MILITIA.

ART. 3, SEC. 5. (He shall be commander-in-chief of the army and navy of this State, and of the militia, except when they shall be called into the service of the United States); but the militia shall not be called into service except in case of rebellion or invasion, and then only when the general assembly shall declare by law that the public safety requires it. [Const. 1834, art. 3, sec. 5, and Const. 1796, art. 2, sec. 5, contained only the provision in parenthesis.]

To Suppress Riots and Mobs — Members of Independent Militia Exempt from Jury Service — Special Laws. —The question was the validity of the [1]Act of 1885 "to organize and incorporate an independent militia." DEADERICK, J.: "The act in question does grant the right to fifteen per cent of the citizens of a county to organize as a corporation, and thereupon exempts them from jury service, while the balance of such citizens are denied the right and exemption provided for the

[1] The remaining sections of this act were repealed by the Act of 1887. Shan. Sup. to M. & V., p. 271.

favored number. Nor can the excluded number, by any thing they can do under that act, receive its immunities and privileges, but under the general laws of the land, eighty-five per cent of the citizens are bound to perform jury service, from which, under the act in question, the fifteen per cent are exempted. . . . We have seen the title to this bill relates solely to the organization and incorporation of the militia. It is not necessary that the title should express fully what is contained in the act. And the generality of the title is no objection if it is not made to cover legislation incongruous in itself. 8 Heis., 519; 2 Lea, 429; 8 Lea, 596; 12 Lea, 253.

"The act in question, while it purports to relate only to the organization of the militia, provides personal exemption of the individual members from duties incumbent on other citizens by the general law. This exemption or personal benefit has no relation or relevancy to the subject expressed in the title to the act. It is also insisted that sec. 11 of the Act of 1885, which empowers the governor to call out the militia when he deems it necessary, to suppress mobs, riots, etc., is in conflict with sec. 5 of art. 3 of the Constitution, which provides that the militia shall not be called into service except in case of rebellion or invasion, and then only when the general assembly shall declare, by law, that the public safety requires it. We think that secs. 11 and 13 of the Act of 1885 are unconstitutional and void." **83**, 709. *Greene et al v. The State.* 1885.

REPRIEVES AND PARDONS.

ART. 3, SEC. 6. He shall have power to grant reprieves and pardons after conviction, except in cases of impeachment.[1]
[Same as Const. 1834, art. 3, sec. 6; Const. 1796, art. 2, sec. 6.]

State Not Responsible for Abuse of Pardoning Power.—"Where, within a few weeks the governor pardoned 350 convicts and the lessees, being suddenly deprived of three-fourths of the labor they had hired, sought to make the State responsible for damages resulting from this viovent abuse of the pardoning power." NICHOLSON, J., held: "The government does not guarantee the fidelity of its officers; and as the

[1] The opinion in the case of Allen *v.* The State, **8**, 295, decided in 1827, was in substance as follows:

The defendant, having been convicted, moved the court to postpone execution of the sentence until next term that he might have time to apply for a pardon. Motion overruled, appeal taken, and bond given for appearance of defendant. WHITE, J.: "The remaining ground for the success of this application to the court is the Constitution. By it 'the governor shall have power to grant reprieves and pardons after conviction, except in cases of impeachment.' Here the power to grant a reprieve or pardon is unquestionably given to the governor. But this power would be given in vain, unless an opportunity was given for its exercise by him. The means of exercising the power must also then come within the Constitution, and be a constitutional right. The means, therefore, must be a right in the convicted citizen to be afforded by this court, in those cases where the final judgment, after conviction, is rendered thereupon. This right must, of necessity, supersede the immediate execution of the judgment, or the carrying the same into effect, as far as is reasonably necessary, under the circumstances, for its exercise, or the making the application to the governor. It is asked from this court, by the plaintiff in error, as the means of enabling him in the present case to exercise his constitutional right to suspend, until the next term of this court, the execution of the judgment, and in the meantime to admit him

lessees made the contract with reference to prevailing law, they assumed the risk of its proper exercise or abuse." 56, 100. *The State v. Ward & Briggs.* 1871.

Pardon—Witness—M. & V., 2800 Et Seq.—McFARLAND, J.: "It is clear, under these statutes, that the witness was made incompetent upon his conviction," and further, "that it was the will of the legislature that he should remain so until in the mode pointed out above. The purport of the authority we have referred to is, that this is not interfering with the constitutional power of the governor to grant pardons; that the governor may pardon the offense, and this relieves the party of the punishment. Still, the legislature may, independent of this, upon grounds of policy, decree such persons incompetent witnesses. Although it is in one sense a punishment, it is a question in which others are interested." 66, 15. *Evans v. The State.* 1872.

Convicts' Good Time Laws—Retrospective Laws.—SNODGRASS, J., held: "Statutes[1] allowing to convicts certain credits on their terms of imprisonment in consideration of good conduct, are unconstitutional as to all sentences in force at time of their passage, as unauthorized exercise of pardoning power." 87, 52. *The State ex rel. v. McClellan.* 1888.

ART. 3, SEC. 7. He shall, at stated times, receive a compensation for his services, which shall not be increased or diminished during the period for which he shall have been elected. [Same as Const. 1834, art. 3, sec. 7; Const. 1796, art. 2, sec. 7.]

ART. 3, SEC. 8. He may require information, in writing, from the officers in the executive department upon any subject relating to the duties of their respective offices. [Same as Const. 1834, art. 3, sec. 8; Const. 1796, art. 2, sec. 8.]

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to bail. For his admission to bail, his counsel have cited and relied upon Hawkins, P. C., book 2, ch. 15, sec. 40, where it is said: 'Also it seems that the court of king's bench, or justices of jail delivery may bail a person convicted of manslaughter, or, as some say, of any other felony, for which he afterwards gets the king's pardon'; and the same book, ch. 8, sec. 65, in these words: 'Also if a man be convicted of manslaughter before such justices (speaking of justices of jail delivery), against plain evidence, it is said they may bail him to the next sessions of jail delivery, in order to purchase his pardon in the meantime.' This court have little doubt but that in cases of manslaughter, the execution of the judgment ought to be suspended, for the burning in the hand is the most important part solicited as the object of pardon, which, if inflicted, the benefit of the privilege would be much impaired. That time should be given him here for making the application is more necessary than in England; for there a pardon may be applied for before conviction, and is often granted; but here, by the Constitution, the pardon can not be granted until after conviction."

[1] See Act (extra session) 1885, ch. 15; Act 1887, ch. 157; Shan. Sup. to M. & V., p. 292.

EXTRA SESSIONS OF LEGISLATURE.

ART. 3, SEC. 9. He may, on extraordinary occasions, convene the general assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specifically called together.[1]

[Const. 1834, Art. 3, Sec. 9. "(He may, on extraordinary occasions, convene a general assembly by proclamation, and shall state to them, when assembled, the purposes for which they shall have been convened); but they shall enter on no legislative business except that for which they were specifically called together." Const. 1796, art. 2, sec. 10, contained only the clause in parenthesis.]

Object of this Provision—Act Passed at a Called Session of the Legislature Under the Constitution of 1834.—REESE, J.: "It is said that the Act of 1836, ch. 4, sec. 2, so far as it authorizes resurveys and changes of location or route in railroads and turnpike roads, is unconstitutional, because of . . . the limited powers of the legislature at a called session, their commission at such time to legislate, so to speak, depending upon the scope and extent of the governor's message to be laid before them. . . . This undoubtedly is a very salutary provision, tending somewhat to check over-legislation, and to render laws a little more stable by furnishing a period of two years, during which time they may be in some degree subjected to the test of a brief experiment. And cases may sometimes arise, it is to be sincerely hoped but seldom, in which it may become the duty of the court to declare a law passed under such circumstances beyond the scope of the legislative commission arising out of this provision of the Constitution. Our present inquiry is whether this be one of such cases. The [2]message of Newton Cannon, governor of the State at the time in question, calls the attention of the legislature to . . . the act of congress, entitled 'An Act to regulate the deposits of the public money,' a copy of which was transmitted to them, and with respect to which the governor remarked that it presented another subject demanding legislative action during that session, and he adds that the reception and judicious investment of such sum or sums of money as may from time to time be appropriated to our State under the provisions of said act must be regarded by all as a matter of paramount importance, and that he had the 'fullest confidence that they would devote to it the most mature consideration.'

"He adds, with regard to the act of congress and the fund arising from it to the State of Tennessee, that 'its happy influence in stimulating us to increased and vigorous exertions in the prosecution of our system of education and internal improvements must be extensively beneficial to the whole community.' At that time, by the pre-existing laws, the State was interested to the extent of one-third in all the turn-

[1] See Williams *v.* Nashville, art. 2, sec. 19, p. 306.

[2] See Senate Journal 1836, p. 4; House Journal 1836, p. 6.

pike companies, and we can not say that the resurvey or change in the location of the routes of such public improvements would not constitute a step, and a very material step, to the judicious investment of the fund alluded to. We can not say, in view of the message, that it was not competent for the legislature 'to enter upon the business' thus submitted to their consideration, or that the provision in question is so remotely connected with that matter or 'business' as not properly to spring out of the general subject. The governor or executive, with us, is in no degree or in any sense, a part of the legislature, and has not, even at a called session, the initiation of bills. At such session, when he submits a general subject, and the legislature 'enter upon the business' of legislating upon it, it will be found a difficult and invidious task to secure the character and details of their provisions so as to determine them of too remote affinity with the message from which they arise. In this case it is not necessary." 22, 460. *Mitchell v. Turnpike Co.* 1842.

Subjects Not Included in the Call.—TURNEY, J.: "Under this provision in the Constitution, the legislature convened on the 25th of April, 1861; remained in session until the 9th of May, when it adjourned under a resolution to reassemble on the 18th of June, at which time it did convene and continue in session until about the 5th of July. Governor Harris, at this extra session, submitted two messages—one of the 25th of April, and the other of the 18th of June. Except a recommendation to elect a State librarian in the room of R. J. Meigs, who had resigned, both these messages are confined to a discussion of the military and political interests of the State, without reference, directly or remotely, to municipal enactment, regulation or amendment. It follows that the legislature, in the passage of the [1]act referred to, entered on legislative business for which they were not especially called together; and the statute is a nullity. This is decisive of the case, and relieves us of the consideration of the question touching the 'so-called' Schedule of 1865, to the Constitution of the State." 49, 577. *Davidson v. Moorman.* 1871.

ART. 3, SEC. 10. He shall take care that the laws be faithfully executed. [Same as Const. 1834, art. 3, sec. 10; Const. 1796, art. 2, sec. 10.]

ART. 3, SEC. 11. He shall, from time to time, give to the general assembly, information of the state of the government, and recommend for their consideration such measures as he shall judge expedient. [Same as Const. 1834, art. 3, sec. 11; Const. 1796, art. 2, sec. 11.]

ART. 3, SEC. 12. (In case of the removal of the governor from office, or of his death or resignation, the powers and duties of the office shall devolve on the speaker of the senate); and in case of the death, removal from office, or resignation of the speaker of the senate, the powers and duties of the office shall devolve on the speaker of the house of representatives. [Same as Const. 1834, art. 3, sec. 12. Const. 1796, art. 2, sec. 12, contained only clause in parenthesis.]

[1]Acts of 1861, ch. 20, sec. 2.

ART. 3, SEC. 13. No member of congress, or person holding any office under the United States, or this State, shall execute the office of governor. [Same as Const. 1834, art. 3, sec. 13; Const. 1796, art. 2, sec. 13.]

ART. 3, SEC. 14. When any officer, the right of whose appointment is by this Constitution vested in the general assembly, shall, during the recess, die, or the office by the expiration of the term, or by other means become vacant, the governor shall have power to fill such vacancy by granting a temporary commission, which shall expire at the end of the next session of the legislature. [Same as Const. 1834, art. 3, sec. 14; Const. 1796, art. 2, sec. 14.]

ART. 3, SEC. 15. There shall be a seal of this State, which shall be kept by the governor and used by him officially, and shall be called the Great Seal of the State of Tennessee. [Same as Const. 1834, art. 3, sec. 15; Const. 1796, art. 2, sec. 15.]

ART. 3, SEC. 16. All grants and commissions shall be in the name and by the authority of the State of Tennessee, be sealed with the State seal, and signed by the governor.[1]

ART. 3, SEC. 17. A secretary of State shall be appointed (by joint vote of the general assembly), and commissioned during the term of four years. He shall keep a fair register of all the official acts and proceedings of the governor, and shall, when required, lay the same and all papers, minutes, and vouchers relative thereto, before the general assembly, and shall perform such other duties as shall be enjoined by law. [Same as Const. 1834, art. 3, sec. 17. Const. 1796, art. 2, sec. 17, did not contain clause in parenthesis, but was otherwise the same.]

ART. 3, SEC. 18. Every bill which may pass both houses of the general assembly, shall, before it becomes a law, be presented to the governor for his signature. If he approve, he shall sign it, and the same shall become a law; but if he refuse to sign it, he shall return it, with his objections thereto in writing, to the house in which it originated, and said house shall cause said objections to be entered at large upon its journal, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that house, shall agree to pass the bill notwithstanding the objections of the executive, it shall be sent, with said objections, to the other house, by which it shall be likewise reconsidered. If approved by a majority of the whole number elected to that house, it shall become a law. The votes of both houses shall be determined by yeas and nays, and the names of all the members voting for or against the bill, shall be entered upon the journals of their respective houses. If the governor shall fail to return any bill, with his objections, within five days (Sunday excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the general assembly, by its adjournment, prevents its return, in which case it shall not become a law. Every joint resolution or order, except on questions of adjournment, shall likewise be presented to the governor for his signature, and before it shall take effect shall receive his signature, and on being disapproved by him, shall in like manner be returned with his objections; and the same, before it shall take effect, shall be re-passed by a majority of all the members elected to both houses, in the manner and according to the rules prescribed in case of a bill.

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[1] See Bates *v.* Taylor, Governor, art. 2, sec. 2, p. 259; also 87, 322, and M. & V., 1094.

ARTICLE IV.

ELECTIONS.

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The Elective Franchise.

Article 4, Section 1. Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage except that each voter shall give to the judges of election where he offers to vote satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law, without which his vote can not be received. And all male citizens of the State shall be subject to the payment of poll taxes and the performance of military duty within such ages as may be prescribed by law. The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.[1]

[Const. 1834, Art. 4, Sec. 1. "Every free white man of the age of twenty-one years, being a citizen of the United States, and a citizen of the county wherein he may offer his vote six months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he resides; provided, that no person shall be disqualified from voting in any election on account of color, who is now, by the law of this State, a competent witness in a court of justice against a white man. All freemen of color shall be exempt from military duty in time of peace, and also from paying a free poll tax."]

[Const. 1796, Art. 3, Sec. 1. "Every freeman of the age of twenty-one years and upwards possessing a freehold in the county wherein he may vote, and being an inhabitant of this State, and every freeman being an inhabitant of any one county in the State six months immediately preceding the day of the election, shall be entitled to vote for members of the general assembly for the county in which he shall reside."]

[The amendment of 1865, schedule section 9, was as follows: "The qualifications of voters and the limitation of the elective franchise may be determined by the general assembly which shall first assemble under the amended Constitution." See 69, 247.]

What is a Citizen with Reference to the Right of Suffrage—Naturalization.—McKinney, J.: "The disqualification of the defendant, to vote in said election, upon which the prosecution is founded is, that being an

[1] For exhaustive reviews of all the authorities on contested elections, see the briefs of Messrs. John J. Vertrees, William H. Carroll, and J. J. Turner, in the first volume of the record in the contest for governor by Peter Turney contestant *v.* H. Clay Evans contestee, which I presented to the State Library. There are only two other complete sets of the proceedings in this contest—Mr. Vertrees has one, and I have the other. The State printed a large number of copies of the proceedings, but it did not include the briefs of all the counsel.

alien born, he was not naturalized six months next preceding the day of said election, his naturalization and admission as a citizen of the United States having taken place within the period of time. On motion of the defendant, the presentment was quashed by his honor, the circuit judge; and the case comes to this court by an appeal in error, on behalf of the State. . . . The journal of the convention, to which we suppose it is admissible to refer for the purpose of ascertaining the sense in which particular words or phrases may have been used in the Constitution, shows that in the draft of the section in question, as reported to the body, from the committee of the whole, the words, 'an inhabitant,' were used; and, on motion, these words were struck out, and 'citizen' inserted in their stead. Now, whatever may be said in respect to the want of exact verbal propriety in the use of the word 'citizen' in this connection, we must suppose that the convention meant something by it. And, in our judgment, no other conclusion can reasonably be deduced than this—that it was intended, by the change of the phraseology, to convey the meaning in the most emphatic form of expression, that no one should be entitled to exercise the privilege of voting who had not been a member of the body politic, and likewise a permanent resident of the local division or county, for the period of six months, immediately preceding the day of election.

"The conditions of this section of the Constitution can not, in our opinion, be fulfilled upon any other construction. And this exposition is free from the imputation of any hardship, or invidious discrimination, as regards naturalized citizens. It puts them on exactly equal footing with natural born citizens, immigrating to this State from other States of the Union, and on the same footing, too, with our own citizens, removing from one county to another in this State; all of whom are disqualified to vote until six months after their removal to the county in which they may have fixed their residence. It may be remarked, too, that this construction of the Constitution may tend, in some degree, to check a very serious practical evil, in the judgment of all right-thinking men—the mischievous struggles, in some quarters of the country, on the eve of an election, to manufacture votes for the occasion, no matter how." **37**, 487. *The State v. Cloksey.* 1858.

Elective Franchise Not an Inalienable Right—Amendment of 1865, Schedule, Section 9.—SHACKLEFORD, J.: "By this provision of the schedule the sovereign people conferred upon the general assembly designated the same absolute, unlimited and sovereign power to determine the qualification of voters, and the right to limit the elective franchise, which the members possessed in their sovereign capacity. Under this provision of the schedule the [1]Acts of June 5, 1865, and May 3,

[1] See Acts 1865, first session, p. 32; Acts 1866, second session, p. 42.

1866, determining the qualification of voters and limiting the elective franchise, was passed. Both these acts impose great restrictions and limitations on the right of voting which did not exist under the Constitution of 1834, art. 4. sec. 1.

"We are, at this advanced term, amidst the varied and complicated duties that have been imposed upon us during the session, unable to do more, at present, than to announce the result of our decision. The elective franchise is not an inalienable right or privilege, but a political right, conferred, limited, or withheld, at the pleasure of the people, acting in their sovereign capacity. Each State may define it in its own Constitution, or empower its legislature to do so.

"The right once granted may be taken away by the exercise of sovereign power, or forfeited for crime, under the laws of the State; and if taken away by the sovereign power of the State (as by an alteration in its Constitution) no vested right is violated, or bill of attainder passed, or act of pains and penalties, in the sense of the Constitution of the United States. It follows, if the convention of 1865 could, under the ratification of the people, declare the qualification of voters and limit the elective franchise, it could delegate the power to the legislature. It might have left the elective franchise open to the action of all future legislation, but it chose to limit it to the general assembly which should first assemble under the Constitution, and is, therefore, binding on the people of the State.

"The relator was pardoned by the President of the United States, the effect of which was to restore him to the rights and privileges of a citizen of the United States; but it did not have the effect without the assent of the State where the sovereign power had excluded him from political rights, to restore him to the exercise of those rights. Women and minors are citizens; yet, by the Constitution, they are prohibited from the exercise of political rights. 4 Dev. 20. No one has ever doubted the proposition that, according to the institutions of this country, the sovereignty of a State exists with the people of the State, and that they may change, alter, abolish, or reform their government at pleasure. Luther *v.* Borden, 7 Howard, 1. This being so, it follows that they had a right to determine who should exercise the right of suffrage.

"We have examined the late cases decided by the Supreme court of the United States, in which the validity of a section of the Constitution of Missouri came under review before that court, requiring every attorney, minister of the gospel, schoolmaster, trustees of charitable institutions, etc., to take an oath restrictive in its character before he could exercise the privileges of his calling. The court held, as well as we can understand from the newspaper report of the case, that where a citizen has an office, employment, or calling, a State can not, directly or indirectly, declare a forfeiture of the office or calling pursued by the citizen

as a means of living by the imposition of an oath which the party can not take. A citizen has the right to labor with his hands or intellectually. These are civil rights, and inalienable, and of which he can not be deprived by the people of the State. But a political right stands upon a very different principle; it is a political privilege or grant, that may be extended or recalled at the will of the sovereign power. It follows, therefore, though the relator was pardoned by the president of the United States, and he was restored to his privileges as such, and though he had the right to vote, under the Constitution of 1834, the legislature having, under the powers delegated to them, changed art. 4, sec. 1, of the Constitution, he could not claim the right to register as a voter unless he brought himself within the provisions of the Act of May 3, 1866. We think the act is binding and valid, and the law of the State. The relator not having complied with the provisions of the law, is not entitled to relief." **46**, 575. *Ridley v. Sherbrook.* 1866.

Elective Franchise—Statutory Precautions Against Mistake and Fraud —Will of the People.—BY THE COURT: "In determining what circumstances of official omission or misconduct will avoid an election, the object to be attained by an election must be kept in view, to wit: the ascertaining of the will of the community upon a particular question. Whatever statutory provisions are essential to the attainment of this end, are obviously indispensable; and whatever precautions prescribed by statute against mistake or fraud, are of such a nature that their omission in the particular instance has resulted in a fraud upon the electors, or has rendered the result of the election incurably uncertain, or the omission of which, in the future, if permitted, must necessarily prove avenues of fraud, tend to prevent a fair exercise of the franchise, or to render elections insecure and uncertain, must be held to be matter of substance, and essential to the validity of the proceeding. But a mere voluntary omission to vote, on the part of those entitled, where a full and fair opportunity has been offered, will not alone avoid the election. Those who did exercise their electoral rights can not be deprived of the fair results of the election by the mere failure of others to vote. The question is not whether all the legal voters in the district actually expressed their will at the polls, but whether they had the opportunity, which the law requires, to do so. . . . The safety of the State depends upon the preservation of the integrity of the elective franchise and the purity of the elections; and these can only be preserved by requiring the officers charged with duties in regard thereto, to comply with all the essential requisites of the laws placed to guard the franchise against abuse, fraud or violence." **45**, 592. *Barry v. Lauck.* 1868.

The Act of Voting a Political Right or Privilege—Act of 1865—Inherent Right of Sovereignty.—SHACKLEFORD, J.: "The right to control and limit the elective franchise by the sovereign will of the people

in the formation of their Constitution, so far as we are informed, has never been doubted. The right was exercised in 1834. Persons who were inhabitants of the State could not exercise the right unless they became citizens of the State and United States. This is one of the inherent rights of sovereignty, and has been recognized by the people of the different States of the Union in the formation of their Constitutions since the organization of the government, each State limiting or enlarging the right of suffrage, thereby recognizing the principle as a political and not a natural right. It follows, therefore, that from long-established precedents, the people of the State, acting in their sovereign character through their representatives in convention assembled, have exercised the right of determining the qualifications of voters, and limiting the elective franchise. The right of suffrage is a political right or privilege, and not a natural or inherent right, and as such is subject to the will of the people in changing or altering the fundamental law.

"No one has ever doubted that the right of sovereignty of a State exists with the people of the State, and possessing the sovereign power, they have the right to adopt and form such a Constitution as may, in their wisdom, conduce to the public good and the protection of the whole people; *provided, always*, its provisions do not conflict with the provisions of the Constitution of the United States—the supreme law of the land. . . . The right here exercised was one of sovereignty, depriving the citizen in the Act of June 1, 1865, for a period of time, from exercising the right of franchise, which was a trust or privilege extended to him by the right of the sovereign power, and which it had the right to recall at any time, without the violation of any vested right. . . . The State, in a sovereign capacity, can not deprive the citizen of the right to labor, and from enjoyment of the proceeds of his labor, by the imposition of an oath. This, the Supreme court says, can not be done, as it amounts to a forfeiture of an estate which the party has in his calling or possession. There is a clear distinction between the case settled by the Supreme court of the United States and the case under consideration. The one is an inherent and natural right, and the other a political right or privilege—a trust delegated. The first falls directly within the prohibitions of the Constitution of the United States; the other is a trust, subject to be revoked by the sovereign will." 46, 268.

[1] *The State v. Staten.* 1869.

Poll Tax on Alien Inhabitants of this State—Art. 2, Sec. 28 and this Section.—COOPER, J.: "There are wise provisions, intended to compel every male citizen, with certain limited exceptions, to pay a personal tax for the protection afforded him, and for the privilege of exercising the elective franchise. These provisions do not contain any restriction

[1] See same case, art. 1, sec. 8, p. 12; art. 2, sec. 2.

on the power of the legislature over the inhabitants of the State who are not citizens. The fact that a person is an alien, owing allegiance to a foreign potentate, may lay him open to heavier legislation, but would certainly not exempt him from taxation common to all citizens. The legislature has unlimited legislative power, except so far as it is restrained by the Constitution of the United States and the Constitution of this State. Davis *v.* The State. 3 Lea, 377. And they who insist upon the unconstitutionality of an act, must point out the specific provision of the Constitution which is violated. The court can only interpose upon a plain violation of some positive provision of the organic law." **74**, 68. *Kuntz v. Davidson County.* 1880.

The Dortch Law Constitutional — Educational Qualification — Class Legislation — Appointment of Commissioners of Registration — Art. 11, Sec. 17 — U. S. Constitution, Fourteenth Amendment, Art. 4, Sec. 4.— The question here was the validity of the [1]Act of 1890 (extra session), ch. 24, known as the "Dortch Law," regulating elections in counties having over certain population. TURNEY, J.: "The convention of 1870, in a spirit of conservatism appropriate to the times, prepared and presented the Constitution which was adopted by the people. That Constitution gives, as we have seen, the elective franchise with the qualifications named. It is certain that at that time there was much misgiving and apprehension as to the future of the State, and all felt the necessity of such constitutional provisions as would, if rightly construed, preserve in its integrity a republican form of government for the State. It is evident the framers of the Constitution did not intend, by its conference of the right to vote, to ignore an educational qualification in all respects. It fixes the age at twenty-one, with a citizenship of the United States, and twelve months' residence in the State, and of six months in the county. The age was fixed as one of maturity, at which period the law presumes the proposed voter to have sufficiently ripened in mental power to determine for himself the soundness or unsoundness of the measures upon which he is called to vote. Citizenship of the United States is a prerequisite, as fixing such interest in the welfare of the federal government as supposes a study of and acquaintance with its governmental policy, and so of residence in the State and county, as well as to become acquainted with the character and capacity of the men who might ask office. These restrictions are terms of educational probation. A foreigner, if in the United States and in any State and county for any number of years, however long, before becoming naturalized, must still reside in the county six months after naturalization before he is entitled to vote. 5 Sneed, 486.

"A native citizen or resident of any county can not remove to another, however short the distance of removal, and be entitled to vote in the

[1] See Shan. Sup. to M. & V., p. 97.

latter until he shall have been a resident citizen thereof for the period of six months. All this is to acquaint and identify him with the wants and interests of the people with whom he proposes to live. It is, from these clearly-defined constitutional requirements, manifest that the framers of the Constitution did not contemplate an indiscriminate and ignorant exercise of the elective franchise, but guarded against it as far as they could then see it. Having done this, they naturally concluded the future might develop mischiefs that would not fall within the defined guards, and to make sure of protection in such emergencies, they granted to the general assembly 'the power to enact laws to secure the freedom of elections and the purity of the ballot box.' The purpose of the law before us is to require the voter to cast his own ballot, to do away, as far as possible, with the illegal practice of voting oftener than once, existing in some quarters of the State, and to defeat bribery, duress and corruption at the polls.

"The law is plain and simple in its provisions. Every voter, however illiterate, can always find a friend to himself, or some one candidate, who will read and explain the law and the manner of its observance. Ballots and cards of instruction are always at hand. The names of candidates are printed, and with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate as with his face, and with easy readiness place his cross (X) opposite that name and fold his ticket as required. The argument of inconvenience is as nothing compared to the rights intended to be protected by that inconvenience, and the pulling, pushing and bribing of ignorant men before and at elections. The inconvenience to a part of the community must yield to the good of the whole. The law presumes the voter expresses the choice of his judgment by his ballot. No man, learned or unlearned, can have a choice without being first informed. If, then, information is required as to any part of the right and duty of voting, why not as well to all?

"The Constitution surrounded the right of suffrage with some inconveniences, and authorized the legislature to attach more. In the exercise of its power, the legislature must be reasonable and just, not imposing impossible or oppressive conditions, else its legislation will be void. That the law applies only to counties of 70,000 and cities of 9,000 inhabitants, does not impeach its validity. All counties and cities that have or may hereafter have the designated population are embraced. It applies to all parts of the State, and each city and county may come within its provisions. This principle has often been applied by this court, holding that similar legislation was not class.

"The statute in no wise infracts the Fourteenth Amendment to the Constitution of the United States. Art. 4, sec. 4, of that instrument guarantees to every State in the Union a republican form of government.

No government can be republican that fails to secure the purity of elections. By these terms of the United States Constitution the legislature of each State has the organic authority for the passage of such laws as will secure that purity, and it can not be urged that such laws abridge the privileges or immunities of the citizen. In the matter of voting, the only privilege one has is to cast his ballot fairly, and not interfere with others by fraud, force, or duress. His privileges are personal. Whatever may be necessary to carry out the sections of the two Constitutions cited, is within the power of the legislature for adoption. It may employ every legislative means, however vigorous, to accomplish the ends contemplated by the framers of the Constitutions. The legislatures are, as a rule, the judges of the means to be adopted, and their necessity. The power to regulate and reform is theirs. They are presumed to know the condition and wants of the State.

"The commissioners and registrars named in the act are not county officers on contemplation of art. 11, sec. 17, of the Constitution, which ordains: 'No county office, created by the legislature, shall be filled otherwise than by the people of the County court.' They merely constitute the machinery by which the law is operated. They are more in the nature of judges or inspectors of elections." 90, 408. *Cook v. The State.* 1891.

Poll Tax Law of 1891 Constitutional—Satisfactory Evidence—Legislature Has Power to Say What Shall Be.—SNODGRASS, J.: "Defendant was indicted in the Circuit court of Wayne county for illegal voting. The charge was that in a certain election, held on the 15th of October, 1895, in the fourth civil district of Wayne county, to elect a justice of the peace, the defendant, being over the age of twenty-one years and having had a poll tax assessment against him for the year next preceding the election, which he had paid, did unlawfully vote in said election without furnishing to the judges thereof satisfactory evidence that he had paid said poll tax, to wit: That he did not present to the judges of said election his original poll tax receipt, or a duly certified duplicate and copy of the same, or the duly authenticated certificate of a constable or deputy collector, as required by law, or make affidavit in writing, signed by him, that he had paid his poll tax and that his receipt therefor was lost or misplaced. The indictment was quashed, on motion of defendant, and the State appealed in error.

"The correctness or incorrectness of the judgment depends upon the question whether chapter 23 of the Acts of the extra session of the legislature of 1891 is or is not constitutional. . . . The first section of the act provided 'that chapter 222 of the Acts of the regular session, approved March 30, 1891, regulating the elective franchise (which act was itself an amendment of the Acts of 1890, ex. sess., ch. 26, p. 67), in accordance with art. 4, sec. 1, of the

Constitution of the State, be so amended as to require that satisfactory evidence to be furnished by the voter to the judges of election, whether general or special, whether national, State, county, or municipal, that he has paid the poll tax contemplated by the Constitution assessed against him, if any, for the year next preceding said election, shall consist of the original poll tax receipt or a duly certified duplicate and copy of the same, or the duly authenticated certificate set out in section 8 (which provided for a trustee's certificate and its form), when said tax has been paid to a constable, and not to said trustee, properly certified by the trustee, or shall make affidavit in writing, and signed by the voter, that he has paid his poll tax and that his receipt is lost or misplaced, which affidavit shall be filed with the said judges, and by them attached and made an exhibit to the returns of said election.' The fifth section of this act provided 'that any person voting, or any judge of any election permitting, knowingly, any person to vote in the same without first having complied with the provisions of section 1 of this act (the section just quoted) shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than fifty dollars and imprisoned in the county jail or workhouse ninety days.'

"A reference to the indictment clearly shows that it states an offense under this act, and, if the act be valid, is clearly good. The objection of the defendant is that the act is unconstitutional, and this involves the consideration of the constitutional provisions which it is urged on the one hand invalidate and on the other authorize this statute. These are embodied in art. 4, sec. 1, of the Constitution of 1870. . . . Independently of the conclusion of this provision, it can not be successfully denied, and is not disputed, that the legislature would have had the right to make the furnishing of 'satisfactory evidence' of the payment of poll tax a prerequisite to voting, and its non-furnishing an indictable offense, and the original Act of 1890, which we have cited, confined itself to these general terms. The first amendatory Act of 1891 provided that the 'satisfactory evidence' should consist of the original poll tax receipt, or a duly certified copy, or an affidavit that the voter had paid his poll tax, or that his receipt was lost or misplaced. Acts 1891, p. 436. The act we are considering enumerated these, and added provision for certificate when paid to a constable—not an enlargement, but rather an explanatory provision covering case of such payment, which might have been of doubtful construction under the first Act of 1891.

"The objection made to the act is not that the legislature could not prescribe that 'satisfactory evidence' should be furnished, nor is it objected that the legislature, in prescribing that such evidence should be a receipt for payment, or a certified copy, or the affidavit of the voter that he had paid the tax, and had such receipt which was lost or mis-

placed, was the requiring of evidence not satisfactory, or the requirement of evidence difficult to make, or which, in any event, could exclude the voter from the exercise of his right to vote. It is obvious that to require the original alone, or either the original or copy of receipt, as the only evidence, might make voting a matter of difficulty, and, in case of loss, an impossibility; but when to these is added the provision that the voter's own affidavit of their loss is sufficient to enable him to vote without them, it is obvious that no hindrance is imposed to his free and unobstructed right of suffrage. It can not be denied that the original receipt was good evidence, nor in its absence that a certified copy is good evidence. It is only in favor of the right, however, that the legislature makes them 'satisfactory,' for it might be true that a voter might have either, and yet not in fact have paid the tax. So it is true that his affidavit might be false, and still it is made evidence. In other words, the legislature has left with the voter, unhampered and unhindered, the opportunity, as well as the right, to furnish such satisfactory evidence in the kind of evidence prescribed, and having done so, have no more nor less discharged, than it was authorized to do, its constitutional duty. If, under the guise of requiring satisfactory evidence, it had acted arbitrarily and contrary to the spirit of the Constitution, if not to its letter, its action might well have been held void, but when it adopts, even under that part of the constitutional article requiring the offering of satisfactory evidence, only the production of that evidence which all mankind would deem to be such as the voter could easiest make, and which is most naturally expected to establish the fact to be shown, it could not be held that the legislature had transcended its power under the Constitution, had the first clause of section 1 of article 4 stood alone.

"But the clause in question does not stand alone. It was obvious to the Constitution makers that fraud and force might be attempted in our elections, as they had been everywhere else, and so it was deemed proper, though it was probably not essential (for, in the absence of restriction by the Constitution, the legislature would have possessed general power on this subject, as all others of legislative nature), to add specific power to enact laws 'to secure the freedom of elections and purity of the ballot box,' thus putting its constitutional authority beyond cavil under the general terms of the Constitution as to 'satisfactory evidence;' but, under such terms, repeated only and literally in a statutory enactment (as was the case in the Act of 1890), and leaving this phrase to be construed as might best accord with the capacity, judgment and partisan bias (where it might exist) of all the thousands of judges of elections who would thereafter have to construe and give it effect, it is clear that no greater source of oppression and impurity of the ballot box could be conceived than might be originated in diverse

and improper construction and exercise of such undefined power by the judges of election. Voters might be denied the privilege of suffrage upon the most false and flimsy pretexts of the insufficiency of their evidence of payment of poll tax, and, on the other hand, might be permitted improperly to exercise it upon the most unsatisfactory, and, indeed, upon no evidence, provided the judges of election should hold themselves satisfied with whatever was offered or with none.

"The framers of the Constitution, therefore, did not intend to leave the legislature, by any restriction, powerless to prevent this result, but especially, along with this declared authority to legislate on the poll tax provision so as to designate the time preceding election for which it should be paid and ages within which it should be paid, authorized it, on this and all other subjects, to enact such laws as would secure the freedom of elections and the purity of the ballot box. Within proper limits, the legislature is the judge of what such laws should be, and it was clearly within their province to say that this was such a law. Cook *v.* The State, 6 Pickle, 407. It is obvious, too, that it is so in fact. We have already shown that the evidence which the act declares to be satisfactory is that most naturally and most easily obtainable, and to be made by the voter, and that only which ordinarily and by common consent is assumed by all to be the acceptable evidence of the fact of payment.

"But we have also suggested that while, for all convenient and practical purposes, it is the most available and best evidence, it is not, in fact, the best. The best evidence which could be required, perhaps, by any judge of election would be the actual payment in their presence, by the voter, of his tax to the collector. Now, suppose, under the Constitution, the legislature had no power to prescribe what should be satisfactory evidence, and the phrase left in general terms to the judges of election for their construction and their guidance, and that some or all judges would be satisfied with no less evidence than that suggested, it is obvious that such view would be subversive, practically, of the right of suffrage. So, other modes of proof might be demanded—as, that the voter should produce witnesses, to prevent imposition of forged receipts on the judges, and then witnesses of the good character of these, that the judges might be thoroughly satisfied. And so illustrations might be multiplied of the various constructions which, naturally and innocently, different judges of election might put upon these words, to say nothing of the multiplied frivolous and false constructions which extreme partisan officials might give to them to defeat or obstruct the votes of those who should be of another political party than that of the judges.

"And, too, in the matter of permitting voters to cast their ballots on 'satisfactory evidence' of poll tax payment, what diversity of construc-

tion would prevail? In one case the mere statement of the voter would be deemed satisfactory, in another not; and so of unsworn statements of other witnesses for the voter. And, again, because some one of the judges, or others, knew, or did not know, that he had voted at a former election in the same year, or because he was good for the tax, he is presumed to have paid it, or, being honest, that presumption is indulged; or because somebody would say that they had heard the collector say this tax was paid, or that all poll tax of the given county was paid, hence no special evidence in the particular case is required, etc. These illustrations, too, might be multiplied indefinitely, but the ones given are sufficient to show how differently and erroneously might be construed and applied the general terms used in the Constitution if it was not permitted to be given one easy, fixed, plain, and natural limitation by the legislature; or, speaking more accurately, if the legislature was not permitted to prescribe just, plain, easily observable offerings of proof as the 'satisfactory evidence' of the Constitution, and thus destroy the facility to suppress the freedom of elections and to sully the purity of the ballot box, which lurks beneath the dangerous limits of this general phraseology.

"It was not only, therefore, within the power of the legislature, but it was the duty of that body to pass some such law as would define this evidence and compel judges of election to accept it when offered, in all cases alike, and thus enable every voter in Tennessee to cast his free and unhindered ballot, and at the same time to prevent the denial to any voter, however low and humble, ignorant or illiterate, of such right by the adoption of such method of evidence as he could get, or, if he could not get, could give himself, when he went to vote, and thus make it impossible for him to be cheated out of the privilege of voting under the constitutional provision on this question. On the general question of the validity and strict binding effects of such laws as require not merely the existence of certain facts, but particular proof of their existence to be made, as a prerequisite to voting, there is no doubt, and we refer to a few of the authorities where the question is more elaborately considered. It is too well settled now to need argument or extended statement. Payne on Elections, sec. 451; Brightly's Leading Cases on Elections, p. 452; Cusack's Election, 136; Pa. St. Rep., 476; Cooley's Const. Lim., p. 758; 13 Penn. Co. Rep., 344; *In re* Duffy, 4 Brewster. And, that a vote cast without such prerequisite proof of fact is illegal, though the fact existed, is well recognized. Some of the cases referred to, and numerous others, cover this proposition.

"These are on the general subject, but the express language of our Constitution is not (merely) that the voter shall pay, but that 'he shall give to the judges of election satisfactory evidence of payment, . . . without which his vote can not be received.' The statute, in pursuance

of this provision, requires the giving of such satisfactory evidence, and makes the failure to do so an indictable offense. The court makes neither the Constitution nor the law, but upon it is devolved the duty of applying them, and so doing, we are left no alternative but to hold the indictment in this case valid. The judgment of the Circuit court is, therefore, reversed and the case remanded for trial." 95, 723. *The State v. Old.* 1895.

ART. 4, SEC. 2. Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes. [Same as Const. 1834, art. 4, sec. 2.]

ART. 4, SEC. 3. Electors shall, in all cases except treason, felony or breach of the peace be privileged from arrest or summons during their attendance at elections, and in going to and returning from them. [Same as Const. 1834, art. 4, sec. 3; Const. 1796, art. 3, sec. 2.]

ART. 4, SEC. 4. In all elections to be made by the general assembly the members thereof shall vote *viva voce*, and their votes shall be entered on the journal. All other elections shall be by ballot. [Same as Const. 1834, art. 4, sec. 4. Const. 1796, art. 3, sec. 3, provided only that "All elections shall be by ballot."]

ARTICLE V.

IMPEACHMENT.

ARTICLE 5, SECTION 1. The house of representatives shall have the sole power of impeachment. [Same as Const. 1834, art. 5, sec. 1; Const. 1796, art. 4, sec. 1.]

ART. 5, SEC. 2. All impeachments shall be tried by the senate. When sitting for that purpose the senators shall be upon oath or affirmation, (and the chief justice of the Supreme court, or, if he be on trial, the senior associate judge, shall preside over them). No person shall be convicted without the concurrence of two-thirds of the senators sworn to try the officer impeached. [Const. 1834, art. 5, sec. 2, did not contain provision in parenthesis, but was otherwise the same.]

[Const. 1796, Art. 4, Sec. 2. "All impeachments shall be tried by the senate. When sitting for that purpose the senators shall be upon oath or affirmation."]

[Const. 1796, Art. 4, Sec. 3. "No person shall be convicted without the concurrence of two-thirds of the members of the whole house."]

ART. 5, SEC. 3. The house of representatives shall elect from their own body three members whose duty it shall be to prosecute impeachments. No impeachments shall be tried until the legislature shall have adjourned *sine die*, when the senate shall proceed to try such impeachment. [Same as Const. 1834, art. 5, sec. 3.]

ART. 5, SEC. 4. The governor, judges of the Supreme court, judges of the inferior courts, chancellors, attorneys for the State, treasurer, comptroller, and secretary of State, shall be liable to impeachment whenever they may, in the opinion of the house of representatives, commit any crime in their official capacity which may require disqualification; but judgment shall only extend to removal from office and disqualification to fill any office thereafter. The parties shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law. (The legislature now has, and shall continue to have, power to relieve from the penalties imposed any person disqualified from holding office by the judgment of a court of impeachment.[1])
[Const. 1834, art. 5, sec. 4, did not include the treasurer and comptroller, nor the clause in parenthesis, but was otherwise the same.]

[Const. 1796, Art. 4, Sec. 4. "The governor and all civil officers under this State shall be liable to impeachment for any misdemeanor in office; but judgment, in such cases, shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit under the State. The party shall nevertheless, in all cases, be liable to indictment, trial, judgment, and punishment according to law.]

OTHER CIVIL OFFICERS—REMOVAL FROM OFFICE.

ART. 5, SEC. 5. Justices of the peace, and other civil officers not hereinbefore mentioned, for crimes or misdemeanors in office, shall be liable to indictment in such courts as the legislature may direct; and, upon conviction, shall be removed from office by said court as if found guilty on impeachment, and shall be subject to such other punishment as may be prescribed by law.[1] [Same as Const. 1834, art. 5, sec. 5.]

Power of the Governor to Appoint and to Remove Officials—Tenure of Office.—SHACKLEFORD, J.: "What is the legal effect of this power of appointment when no tenure of office is fixed by the Constitution or

[1] See Fields *v.* The State, art. 1, sec. 8, p. 29; Cross *v.* Mercer, art. 6, sec. 15; also **88**, 754.

laws of the State? Does the officer appointed hold the office during good behavior (which is the same thing in contemplation of law) during his life, or is it to be held at the will and discretion of the appointing power, and subject to removal at pleasure? It is insisted, under the Constitution and laws of the State, the governor has no power of removal, consequently the commissioner held his office during good behavior, unless he is removed by the judgment or decree of some court, as provided in sec. 5, art. 5, of the Constitution of the State. This question has not been before this court, that we are aware of, but has been before the Supreme court of the United States and some of the courts of the different States, and has been settled by the practice and usage of the government of the United States for more than half a century. The provisions of the fourth section of article second of the Constitution of the United States is, in effect, similar to the fifth section of article fifth in our Constitution, relative to the removal of officers for crimes and misdemeanors. Our Constitution and the Constitution of the United States is silent with respect to the removal of officers, when the tenure is not fixed, except for crimes and misdemeanors. The Constitution of the State provides for the tenure of judges, attorney-generals, clerks, sheriffs, justices of the peace, and other officers therein specified, consequently they hold their offices for the periods therein fixed, unless removed by due process of law. It can not be admitted, under our Constitution, that where no tenure is fixed the person appointed and filling the office should hold it during good behavior.

"This question came before the Supreme court of the United States in the case of *ex parte* Hennem, and reported in 13 Peters, 256. The case was: The clerk of a District court of the United States had been removed from office by the presiding judge. It was held, there being no tenure of office fixed by law, that the power of removal existed—that the power of appointment necessarily involved the power of removal. The same power of removal is vested in the president of the United States where the power of appointment is given him. This has been often exercised and acted upon by him. In the case of Aaron Goodrich, who was appointed by General Taylor, then president, chief justice of the territory of Minnesota, he was removed by Mr. Filmore, the president of the United States, and his action was sustained by the courts. In the case of Avery against the inhabitants of Tyringham, 3 Mass., 177, it was settled as a general rule that an office is held at the will of either party, unless a different tenure is expressed in the appointment, and the power of removal was recognized. In the case of Leman *v.* Sutherland, 3 Sergeant & Rawle, 145, the question in that case turned upon the construction and laws of Pennsylvania. By the Constitution of that State it was provided the governor shall appoint all officers whose office is established by law, and whose appointments are not

otherwise provided for. The court says: 'The Constitution is silent as to the removal of officers, yet it has been generally supposed the power of removal rested with the governor, except in those cases where the tenure was during good behavior.' In sec. 1537 of Story's Commentaries on the Constitution he says: 'It is observable that the Constitution makes no mention of any power of removal by the executive of any office whatever. As, however, the tenure of no officers, except those in the judicial department, is by the Constitution provided to be during good behavior, it follows, by an irresistible inference, that all others must hold their office during pleasure, unless congress shall have given some other duration to their office.'

"The Act of the 26th of February, 1868, conferring upon the governor the power to remove for dereliction of duty, fraud, or other irregularities, does not limit and control the power of the governor in removing for these causes alone. It was not designed or intended by the legislature that he should hear proof and determine as a judicial officer, whether the appointees were guilty of fraud or dereliction of duty, and to restrain the power of removal vested in him under the settled rules of law. We are satisfied upon principle and authority, that there being no tenure of office fixed for the commissioner of registration, and the power of appointment having been vested in the governor of the State for filling said office, the law vested in him the power of removal, and that he holds his office at the will and pleasure of the governor of the State." **46**, 489. *Williams v. Bougner.* 1869.

ARTICLE VI.

THE JUDICIAL DEPARTMENT.

Power of Legislature to Establish Courts.

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Article 6, Section 1. The judicial power of this State shall be vested in one Supreme court and in such circuit, chancery,[1] and other inferior[2] courts, as the legislature shall from time to time ordain and establish, in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.[3]

[Const. 1834, Art. 6, Sec. 1. "The judicial power of this State shall be vested in one Supreme court and in such other inferior courts as the legislature shall from time to time ordain and establish, in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary."]

[Const. 1796, Art. 5, Sec. 1. "The judicial power of the State shall be vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish."[4]]

Conferring Jurisdiction on Single Justice.—The question was the construction of the [5]Act of 1801, ch. 7, sec. 1, as to its literal meaning, also as to its constitutionality. On the latter point the court said: "In the case of Stuart[6] against Windal in the old Superior court, it was decided that the Constitution authorized the legislature to give a single justice original jurisdiction, in such cases as this, provided the right of having a jury trial[7] was secured to the parties, if either of them might wish it." That question was regarded by the court in this case as being settled. **2**, 235. *Thompson v. Gibson.*

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[1] **34**, 56; **39**, 254. [2] **26**, 131.

[3] **70**, 177; Acts 1879, ch. 180; **71**, 257; Act 1877, ch. 97; M. & V., 5043; **71**, 415.

[4] H. & C., vol. 1, p. 202; Code 1858, 4123, sub-sec. 2; T. & S., 4123, sub-sec. 2; M. & V., 4898, sub-sec. 2.

[5] Unreported.

[6] Supreme Court—Green, J.: "It is contended that this is a special court, having no relation to the other courts in this State, and is not, therefore, 'superior or inferior,' within the meaning of the first section of the fifth article of the Constitution. . . . Upon this proposition, it will

Criminal Courts.—The Act of 1870, ch. 115, established a criminal court for Montgomery county. NELSON, J.: "We are unable to perceive that the act is in conflict with the Constitution of 1834 or 1870. Art. 6, sec. 1, of each Constitution, authorizes the legislature, from time to time, to ordain and establish inferior courts; and we are not satisfied that the power to establish a criminal court was not rightfully exercised in this, as it had been previously in various similar cases." **50**, 114. *Wilcox v. The State.* 1871.

Circuit Court Judge—Term of Office—Compensation—Legislature May Abolish Office—Salary for Whole Term.—By an act of the legislature, passed December 4, 1869, the Second Circuit court of Shelby county was created, and relator was elected judge of this court on the fourth Thursday in May, 1870. Under the Constitution and law he was duly commissioned for eight years. On March 15, 1875, the legislature passed an act abolishing the office. The validity of this act was contested and held constitutional in the case of The State *ex rel.* Coleman *v.* Campbell in a manuscript opinion by Judge NICHOLSON, in which all the judges concurred except Judge FREEMAN. Relator Halsey obtained a peremptory *mandamus* against the comptroller to issue a warrant for his salary to the end of his term—September, 1878—and the comptroller appealed. MCFARLAND, J., reaffirmed the decision in the case referred to and said: "We believe it is not denied that previous to the Constitution of 1870, the legislature did possess the power to abolish Circuit and Chancery courts at pleasure. In fact, the very court in question was created by an Act of the 4th of December, 1869, which abolished the system of courts previously existing in Shelby county, and established instead two Circuit courts, two Chancery courts, and one Criminal court, one of the Circuit courts being the one now in controversy. With the abolition of the existing courts, the judges thereof were displaced and new judges elected to fill the new courts created by the act.

"The validity of this act was recognized by the convention of 1870, and the courts continued to exist until one of them was abolished by

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only be necessary to recur to the language of the Constitution, art. 5, sec. 1, in which the judicial power of the State is vested in *such* superior and inferior courts of law and equity as the legislature shall, from time to time, direct and establish. Had the framers of the Constitution intended to restrict the legislation upon this subject to the courts then in operation, and only meant to authorize an increase of them, or the number of places of holding them, they would have used very different language. To create a new district and appoint additional judges to hold the court there, or to direct the sittings of the court of pleas and quarter sessions in a new county, would not be the establishment of courts in the sense here indicated. There is but one Supreme court in the State, although it holds sessions at several places. So the creation of new districts would only have been providing for the sitting of the District court at additional places. Nor can it be seen that it was intended to restrict legislation to the creation of such courts as should be appealed from, and therefore '*inferior*,' and an appellate court, which would be therefore '*superior*.' The right of appeal is only conferred by statute. No constitutional provision requires that it should exist. This can not, therefore, be the sense of these words. It would be perfectly competent for the legislature to abolish the Supreme court and take away the right of appeal from the County to the Circuit court. Each would then exercise its own peculiar jurisdiction, and be supreme within its sphere of action. I conclude, as a necessary consequence from what has been said, that the legislature has power to create as many different courts as the wants of the country may require, and each to be as distinct and independent of the other as the court now under consideration is distinct and independent of all others in this State." **10**, 601. *Bank v. Cooper.* 1831.

The above decision probably caused the alteration in the Constitution of 1796 by the convention of 1834.

the Act of 1875, before referred to. This was by no means the only instance in which the legislature exercised the power of establishing and abolishing courts as the public necessity demanded under the Constitution of 1834. And, in fact, we do not understand that it is seriously denied that the power existed, until the adoption of the Constitution of 1870. Now the only difference in these parts of the Constitutions of 1834 and 1870, in reference to the creating of courts, is this: By the Constitution of 1834, 'the judicial power of the State was vested in one Supreme court, in such inferior courts as the legislature may from time to time ordain and establish, and in the judges thereof.' By the Constitution of 1870, 'the judicial power of this State is vested in one Supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish, and in the judges thereof,' etc. The difference is, that in the Constitution of 1870, 'Circuit and Chancery courts' are expressly named as some of the inferior courts that the legislature may from time to time ordain and establish. It will be borne in mind that there is no clause in either Constitution, in terms or by implication, prohibiting the legislature from abolishing any of the inferior courts after they have been once established. We have seen that under the Constitution of 1834, it was left to the legislature to determine how many inferior courts were necessary to meet the public demand, and to ordain and establish them accordingly, and in so doing to abolish courts previously existing and substitute others in their places, and necessarily to increase and diminish the number at pleasure. The legislature also had power to determine the character of the inferior courts, whether the Circuit, Chancery, or other courts.

"In this latter respect the Constitution of 1870 makes a change. Circuit and Chancery courts are specified as some of the inferior courts, to be established by the legislature from time to time, and it may be conceded that the two systems are therein recognized, and it may be further conceded that the legislature has no power to abolish either system. But was it ever supposed by the framers of the Constitution that they were depriving the legislature of the power to judge and determine how many Circuit and Chancery courts were necessary to dispatch the public business in the different counties of the State? It was known that under the previous Constitution the power to determine the number was left to the legislature, and if a change in this respect was intended, it would have been easy to so express the intention in unmistakable language, and surely it would have been so expressed. The Constitution of 1870, while it recognizes Circuit and Chancery courts as part of the inferior courts of the State, does not recognize any particular number of them, or specify how many of them shall exist. . . The truth is, the legislature has the power, in many ways, to destroy

the government. The remedy, where the legislature attempts to exercise power it does not possess, is in the courts, but where it simply abuses power that it does possess, the remedy is with the people at the ballot box.

"But it is argued that although by the foregoing construction, the legislature may have power to abolish the courts when they become unnecessary, that the abolition of the court can only take effect at the expiration of the judge's term, otherwise we defeat that clause of the Constitution which says that the judge's shall be eight years. If the framers of the Constitution intended to leave it to the legislature to establish and abolish courts as the public necessities demanded, this was not qualified or limited by the clause as to the judge's term of office. To so hold, would be to allow the clause as to the length of the judge's term to overthrow the other clause, whereas we construe the provision that the judge's term shall be eight years to be upon the assumption that the court continues to exist; otherwise we should have to hold that the court must continue, although declared unnecessary and abolished by the legislature, simply to secure to the judge his full term and salary. . . . Our Constitution does not recognize a judgeship except as the judge is the incumbent of a court or courts which he is commissioned to hold. We have no supernumeraries, and although while he holds the office he may interchange with other judges and exercise the functions of his office in any part of the State, it can hardly be maintained that the relator has in fact continued to be a judge from the time his court was abolished until his term expired. He does not aver that he has exercised the functions of a judge, and had he done so, his acts would no doubt have been void.

"The argument is further pressed upon these provisions of the Constitution relating to a judge's term of office, his salary, and also the mode of his removal. These provisions, in brief, are, that the term of the circuit judge or chancellor is eight years. He shall receive at stated times a compensation to be ascertained by law, which shall not be increased or diminished during the term for which he was elected. Speaking of these provisions, Judge Nicholson, in the opinion referred to, says: 'We have not deemed it necessary to discuss the bearing upon the case of the provisions of the Constitution which provide for the salaries and term of service of the judges, for the reason that we consider it too clear for argument, that if the law abolishing the courts is valid, the offices and their incumbents necessarily cease, and of course along with them their salaries. In our own view of the Constitution,' he continues, 'the judge's right to his full term and his full salary is not dependent alone upon his good conduct, but also upon the contingency that the legislature may, for the public good in ordaining and establishing the courts from time to time, consider his office unnecessary and

abolish it. The exercise of this power of the legislature is neither such as interferes with the independence of the judge or with his term of office, or can be properly complained of.' We approve and adopt this language. The judge's term of office is eight years. The legislature has no power to change the length of his term, either by direct or indirect legislation. His salary can not be increased or diminished during his term, and he can not be removed except in the manner pointed out in the Constitution, or by impeachment, but all this assumes that the office still exists. To dispense with an unnecessary court is not to change his term of judgeship, or is it to affect the guaranties of the Constitution as to his salary, nor does it remove the judge from office. The office no longer exists, and of course a removal from an office that has no existence is not a conceivable proposition. . . .

"These provisions of the Constitution were intended for the protection and benefit, not of the judge alone, but of the people, to secure a judiciary free, as far as possible, from improper influences, and therefore the term is fixed. The salary is to be ascertained by law, and not increased or diminished during his term, and he can not be indirectly removed. But the framers of the Constitution never intended to say by these provisions that unnecessary courts should not be abolished, or if abolished, that the judges should continue to receive their compensation as before. The provisions of the Constitution as to the duration of the judge's term and his salary were intended to be of no higher sanctity than the other provisions. They are parts of the same Constitution under which the legislature is expressly given the power to ordain and establish courts from time to time, and, as we have seen, to abolish them. The different parts of the Constitution are to be construed together. While the court existed these provisions should be enforced in favor of the judges and the people, but where the courts were abolished, to continue them in force in favor of judges after they had ceased to be judges would, we think, violate the spirit of the organic law, and out of too tender a regard for the supposed rights of one man, injure the rights of the balance of the people." FREEMAN, J., dissented. **70**, 318. *The State ex rel. Halsey v. Gaines, Compt.* 1879.

Special Courts.—T. S. WEBB, Sp. J. In this case the doctrine was reaffirmed that the legislature has power to create and establish special courts. **92**, 85. [1]*Ellis v. The State.* 1892.

Chancery Courts—Increase of Jurisdiction—Art. 6, Sec. 8—Object of—Trial by Jury—Art. 1, Sec. 6.—The [2]act of the legislature, passed March 23, 1877, conferring jurisdiction on the Chancery courts "of all civil causes of action now triable in the Circuit court, except for injuries to person, property, or character, involving unliquidated damages," was

[1] See same case, art. 1, sec. 9, p. 81; art. 10, sec. 4. [2] M. & V., 5013.

considered from a constitutional standpoint. FREEMAN, J.: "The law under discussion must, then, be tested by its accord with the Constitution, understood by the light of the existent state of things at the time and previous to the adoption of the Constitution. It is an enactment of the legislature of the State, and is operative unless in violation of the express terms or fairly implied provisions of that instrument. No express prohibition to its enactment is found. It can only be attacked, then, by finding a clearly implied or fairly inferred prohibition. This is to be made out from the language quoted distributing the judicial power, that is, that 'it shall be vested in such circuit, chancery and other inferior courts as the legislature shall, from time to time, ordain and establish.' The conclusion sought involves the affirmation of the proposition that this language, by fair and just implication, fixes and defines the limits of the jurisdiction of these courts. This must be so, for if it does not fix or define the limits of jurisdiction, then the legislature could not have violated its requirement by increasing the jurisdiction of the Chancery court, that is, simply extending the sphere of the powers of that court. This is a legitimate exercise of the law-making power, unless some limit is prescribed to its exercise by the Constitution. There being, as conceded, no express prohibition on this power in the Constitution, the inferential prohibition must be had from the article cited. This inference necessarily involves the idea that the true limitations upon the jurisdiction of these courts may be ascertained from the language used, by reference to the words used, or from their fair construction in the light of existent things at the time of the adoption of the Constitution. The proposition to be maintained is, the law is prohibited by the language, or fair implication drawn from it, of the Constitution. The language contains no prohibition that reaches the question—the implication must, or the proposition fails.

"The theory on which the argument must rest is, that the constitutional establishment or recognition of the Chancery court, necessarily or by fair implication, involves the proposition of this court, with its then defined jurisdiction, was the purpose of the convention; that is, by the clause of the Constitution not only is the judicial power distributed and courts mentioned ordained, but the jurisdiction of these courts also defined and their limits fixed. The only conceivable limit that could be fixed on their jurisdiction by the simple fact of their ordination would be that which they then possessed, for the inference must be drawn or implication made from their designation as Circuit and Chancery courts, and the idea that is conveyed by these terms in connection with the actual fact or existence and traditions appertaining to that existence in our State polity at the time.

"In order to make this influence effective to defeat the law before us, there must be derived from this section of the Constitution not only

the existence of such courts, but also a fixed and defined boundary, either in fact or with reasonable certainty to be ascertained, or else there could be no violation of the constitutional jurisdiction that would invalidate an enactment of the legislature either increasing or changing the limits of that jurisdiction. An undefined limitation would be impossible to be enforced, for its boundaries could not be ascertained so as to mark the point when the legislature trespassed upon the constitutional inhibition. This seems too clear for doubt or argument. The limit must be fixed, the boundaries of this jurisdiction defined by the language of this section, or else the legislature is free to act as it may deem the public interest shall require. As we have said, we think the only conceivable limit that can be with any plausibility inferred in the case is that the jurisdiction then possessed and exercised by the Chancery court was intended to be fixed and established as its constitutional jurisdiction. From this view it would follow, however, that there could be no change in that jurisdiction after the adoption of the Constitution, certainly none by the legislature, unless we assume that a change or alteration could be made by the legislature in the Constitution itself, or that body have the right to give or take away what was prohibited or not given by the Constitution. This will not be claimed. This proposition involves, then, the fixedness, for all time, of the jurisdiction of this court, a constitutional congelation of the unstable elements of jurisdiction into a defined mass that can not be diminished or enlarged by legislative action.

In this we think the argument would prove more than its advocates would be willing to maintain. The Chancery court has been steadily advancing and widening the boundaries of its jurisdiction from its earliest history down to the present day. We need but to refer to the familiar contest between Lord Coke and Ellesmere, in the days of James, as to the power of a court of chancery to enjoin parties from proceeding at law, in which the power was stoutly denied by Coke, and as earnestly insisted on by the chancellor. The court of chancery, as we know, succeeded in maintaining its ground, and thereby established its enlarged jurisdiction. Our books are full of such instances, familiar to any lawyer. Was it intended to stop and put an iron barrier in the way of the development of this source of jurisdiction of this court? We apprehend it will hardly be so contended, yet the argument inevitably tends to this, for if the Constitution has fixed, by any ascertainable limits, the jurisdiction of the court, then the court could no more increase or accrete jurisdiction than could the legislature confer it. The one would be as much bound by the Constitution as the other. To both, the Constitution is the supreme law before which they must yield. The limits of jurisdiction must be fixed or ascertainable, or else no law can be held to violate the Constitution that enlarges these limits. Again, the Circuit court is ordained and established in precisely the same lan-

guage as is the Chancery court, and the same rules would have application. . . .

"The language of the eighth section of the same article is: 'The jurisdiction of the Circuit, Chancery, and other inferior courts, shall be as now established by law, until changed by the legislature.' If the convention had stopped at the first clause of this section, it would have been precisely the provision which would have sustained the argument. The jurisdiction of all these courts would have been unalterably fixed within the limits as then defined and ascertainable by the then existent law. But we are compelled to give effect to the other clause. It is equally a part of the Constitution—that is, until changed by the legislature. This language must be taken, as other language, to mean what it says, and a fair construction of it be given. It can only mean, we think, that there was no change made, or intended to be made, by the convention in the then existent jurisdiction of these courts, but that such change of jurisdiction—that is, enlargement or diminution of their sphere of action—was to be left, and was authorized to be made by the legislature. . . .

"This clause most certainly authorized the legislature to change the jurisdiction of the other courts, and if so, it equally authorizes the change of the jurisdiction of the Chancery court, and that is all that is done in the act under consideration.

"This section serves to guide us clearly as to what elements of the complex idea embraced in the words 'Circuit and Chancery courts' were in the mind of the convention, and intended to be imbedded in the Constitution and put beyond legislative action or change. These words have at least two, if not more, distinct facts or elements which are conveyed when we speak of these courts: one is of the one or other court, with a judge or chancellor performing the judicial functions by means of certain forms or machinery in a certain mode, that is the one, as we have said, by the forms known as common law procedure; the other, that known as the chancery form of procedure. These elements or phases of the idea of a Circuit or Chancery court are not only separable and distinct in thought, but equally so in fact, from the other element of jurisdiction or power to act judicially on a greater or less number of rights. While it is conceded that jurisdiction is an essential element for the action of a court, yet it is equally a court, whether that jurisdiction be over many or few questions or subjects of judicial action. The extent or narrowness of the jurisdiction exercised does not at all go to the idea of its existence intact, but only its efficiency to perform a larger or smaller function as an agency of government. This hardly need be illustrated. The court of chancery was as much a court of chancery in the days when its jurisdiction was confined to a few subjects as it is now, since its jurisdiction has, by gradual encroachment

and accretion, been extended so as to embrace in some form the largest mass of the questions passed upon by our courts. In view of this, we think it clear, from the first and eighth sections of the article from which we have quoted, that the preservation of these courts, with their distinctive features, modes of procedure and organism, substantially as independent and separate agencies for the exercise of the judicial power was intended—the courts to remain intact. But the matter of their jurisdiction is not so fixed, nor was it so intended. This was to remain as then, until changed by the legislature. To what extent the jurisdiction thus left under control of the legislature may be changed, we could not definitely determine. The existence, however, of these courts as parts of the judicial power of the government, is beyond the power of the legislature to destroy. The courts are to be preserved intact, but what shall be the matter over which they shall exercise their powers subject to certain limitations involved in other clauses of the Constitution, is left to legislative discretion. . . .

"The act under consideration seems free from all objections. It does not deprive the Circuit court of any of its jurisdiction—leaves that precisely where it stood before. It only adds to the jurisdiction of the court of chancery by giving it concurrent jurisdiction over all civil cases except those specially mentioned as excluded. In fact, it has but gone one step further than was the law before. . . . The exercise of the power to increase the jurisdiction of a court, thereby giving it a more enlarged field of operation, does not involve the power to do the opposite, that is, to destroy. Whenever any law shall be passed with any such purpose, or any direct tendency to produce this result, we shall promptly strike it down as in violation of the Constitution which estab lished this court. But seeing no such purpose in this act, we can not arbitrarily assume it to exist.

"It is said the clause of the Constitution providing that the jurisdiction of the court shall remain until altered by the legislature was only intended to secure the jurisdiction as it was—rebut the idea of change. This can not be, for two reasons: first, the jurisdiction of these courts would have remained as it then stood without this clause; second, all laws are expressly kept in force not inconsistent with the Constitution by another clause. To give this clause any meaning it must be held a reservation of power to alter the jurisdiction of the courts established, and as a matter of course to enlarge or diminish, or else there could be no alteration.

"The only other objection to be noticed is the objection that by conferring the jurisdiction here given on the Chancery courts, the right of trial by jury is impaired, as guaranteed by article 6 of the Bill of Rights. Several conclusive answers may be given to this. First, if the power to enlarge and alter the jurisdiction is given in the Constitution, whenever

it is rightfully conferred on the Chancery courts, then that jurisdiction may be exercised according to the forms by which such courts are accustomed to administer remedies. This article in the Bill of Rights was never understood to apply to the administration of the law in such courts, and it has been held so in many other cases, such as formerly in cases of bastardy. Kirkpatrick *v.* The State, Meigs, 124." COOPER, J., dissented. **71**, 597. *Jackson, Morris & Co. v. Nimmo & Thornhill.* 1879.

County Court—Jurisdiction and Powers Purely Statutory—Can Not Release Individual or Corporation From Payment of Taxes for County Purposes.—The County court of Wilson, as an inducement to complainant company to extend its line of road from Lebanon eastwardly to Knoxville, released from the payment of taxation for county purposes all the property then or thereafter in that county for a period of fifteen years, beginning January 1, 1887. CALDWELL, J.: "By statute 'a court is established in each county of this State, composed of the magistrates of the county, for the dispatch of probate and other business *intrusted to it*, to be called the County court.' Code (M. & V.), sec. 207. The powers 'intrusted to' the County courts thus established emanate from the legislature alone, hence, the measure and limit of those powers are to be found in the statutes, and when a power claimed for them is not conferred by some statute it must be held not to exist. . . .

"County courts possess no jurisdiction or powers but those conferred by statute. . . . No statute has, in terms or by implication, authorized County courts to exempt or release, upon any pretext or consideration whatever, the property of a railway company, consisting of its road-bed, rolling stock, etc., from its just proportion of taxation for county purposes. . . . And such release or exemption of railway property from county taxation is none the less *ultra vires* and void, because it was offered as an inducement for the location and building of a railroad, which was accordingly constructed by non-residents, resulting in great benefits, in a general way, to the county. . . . The legislature has not unlimited power, under our Constitution, to authorize the County courts to exempt or release railway property from taxation for county purposes." **89**, 606. *N. & K. R. R. Co. v. Wilson County.* 1891.

JURISDICTION OF SUPREME COURT.

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ART. 6, SEC. 2. The Supreme court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the State. The judges shall designate one of their own number who shall preside as chief justice. The concurrence of three of the judges shall, in every case be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme court. Said court shall be held at Knoxville, Nashville, and Jackson.[1]

[Const. 1834, Art. 6, Sec. 2. "The Supreme court shall consist of three judges, one of whom shall reside in each of the grand divisions of the State. The concurrence of two of the judges shall, in every case, be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme court. Said court shall be held at one place, and at one place only, in each of the three grand divisions of the State."]

Judgment by Motion Against Co-Sureties on Bond of Clerk.—TURLEY, J., held: "The Supreme court has no jurisdiction to render a judgment on motion in favor of some of the sureties of a clerk against their co-sureties, where a judgment had at the same term been rendered in a suit against the first set of sureties for the official delinquency of the principal." **17**, 16. *Waters et al. v. Lewis et al.* 1836.

Transfer of Chancery Causes Under the Old Constitutions and Statutes.—CARUTHERS, J.: "This case was transferred from the Gibson Chancery court, before any decree, under the provisions of the Acts of 1825 and 1829, by which the chancellor was authorized to make such transfer, where a case had been continued two terms, on account of the chancellor's incompetency. Are these acts now in force, or have they

[1] See **18**, 19, and **48**, 789.

been superseded by the Constitution of 1834, and the Act of 1835? It is a question of jurisdiction, and should be deliberately settled. While, on the one hand, this court would diminish or restrict its jurisdiction, yet, on the other, it should be as careful not to enlarge or extend it beyond the limits fixed by the Constitution and laws enacted in conformity to it. This is the more important, as this is made an independent co-ordinate department of the government, and within its prescribed limits there is no power that can control it. It is as independent, within its proper sphere, as is the executive or legislature. The people have entrusted to this department the supreme judicial power, and placed it and its jurisdiction beyond the legislative power. Neither can one interfere with or control the other, in the proper discharge of its functions. Under the old Constitution, this was not so. This department was, by that, entirely the creature of the legislature. In art. 5, sec. 1, it says: 'The judicial power of the State shall be vested in such superior and inferior courts of law and equity, as the legislature shall, from time to time, direct and establish.'

"By the Constitution of 1834, art. 6, . . . the convention made this a constitutional court, and not being content even to leave the scope and extent of its jurisdiction to the legislature, prescribed it differently in the next section. . . . The last clause, it is insisted, covers the case before us, as by the Act of 1829 the old Supreme court had jurisdiction in such cases. We do not understand the new Constitution to refer to any such matters. It was evidently intended, by the emphatic words employed—'appellate only'—to confine the clause which apparently extends the jurisdiction to other cases, to such powers as, though not appellate, were absolutely necessary in carrying out and completing the jurisdiction given; such as forfeited recognizances, failure of officers to return process, or false returns, motions against them, etc. In all these cases, important questions might arise, and even juries be required. So there is scope enough for that clause, without extending it to the case provided by the Act of 1829, by which original jurisdiction would be taken of regular and primary suits between parties. It was intended, in all controversies between parties, that they should have the advantage of two tribunals; first, the court established by the legislature, and then by appeal, the court of last resort established by the Constitution. The construction contended for, would defeat this provision, in the class of cases embraced. Very ample provision has been made for these cases, by the legislature, showing that the opinion has not been entertained by that body, that the old and easy mode of transferring cases to this court, in all cases where the chancellor might be incompetent, still existed. Such cases may be transferred to the Circuit courts, and the chancellors interchange with each other, or with the Circuit judges.

"The compilers of the statutes in 1836 did not incorporate the Act of 1829 in their revisal, supposing it was not in force. But it is shown that our predecessors have, since that time, taken jurisdiction in such cases, and thereby evinced their opinion that the act was still obligatory upon this court. It does not appear that the question was ever made and debated before them, and we have no reported decisions upon the question. So we regard it as an open question, and as it involves a construction in relation to our jurisdiction and powers, it must be considered an important one. Upon the fullest examination and reflection we have been able to bestow upon it, we have arrived at the conclusion that the Act of 1829 is not in force, and that we have no jurisdiction in the case."[1] 37, 434. *Miller et al. v. Conlee et al.* 1858.

Reasons for Giving This Court Appellate Jurisdiction Only—Act Directing Scire Facias to Issue From Supreme Court Unconstitutional Because Involving Determination of Original Questions.—CARUTHERS, J.: "In pursuance of a joint resolution of the last general assembly, a motion is now made by the attorney general for the issuance of a *scire facias* against the Bank of East Tennessee to show cause why its charter should not be declared forfeited. This bank was chartered by the legislature in 1843, ch. 60. By the eleventh section the legislature is authorized, whenever they are of the opinion that the charter of the corporation has been violated, 'by joint resolution to direct a *scire facias* to issue from the Supreme court, in the name of the State of Tennessee, calling upon said corporation to show cause why the charter should not be declared forfeited.' The court is required to inquire into the charges which are alleged, and to submit all issues of fact to a jury, etc. Have we the authority under the Constitution to exercise the powers here conferred—or, in other words, is this act of the legislature constitutional? is the first question to be considered. We can not, without a violation of the Constitution, to which we owe our existence as a court, and which we have sworn to obey, transcend the limits therein assigned to us. . . .

"Art. 6, sec. 1: 'The judicial power of this State shall be vested in one Supreme court;' and such inferior courts as the legislature shall 'ordain and establish,' etc. So this court of last resort is placed out of and beyond the power of the legislature, as to its existence and composition, as by the next section it is to consist of three judges only, and they are to reside, one in each of the 'grand divisions of the State.' So also is its jurisdiction prescribed and limited. . . . The language is emphatic as to the jurisdiction; it 'shall be appellate only.' This was doubtless intended to prohibit that course of legislation which had before and might again be resorted to, either because of high confidence

[1] 70, 211.

in this court, or to overburden it with business, or to save expense to parties in certain cases by shortening the road of litigation. But let the reason be what it may, the restriction is distinct and imperative. The fair inference from the language adopted is, that it was the opinion of the convention that the labor and responsibility of correcting errors in the proceedings and judgments of courts of law, and the hearing of appeals in chancery, for the whole State, would afford about as much labor as three men could well perform, without encumbering them with any original jurisdiction. And certainly it has so turned out. The members of the legal profession who witness the labors of this court will not differ as to the foresight of the convention in this respect. Yet whether this is so or not, or whatever reasons may have actuated them, they have limited and confined us to cases of appeal, by language too clear in its import for misconstruction.

"In this act the jurisdiction conferred is to institute a proceeding of an important character against a corporation to ascertain facts, by the intervention of a jury, and to declare the charter forfeited in the event the charges are found to be true. Here, then, an important suit to individuals and the public is to be originated, tried, and determined in this court. Can there be a doubt that such jurisdiction is original and not appellate? Surely not. The old Constitution did not prescribe the jurisdiction of this court, nor in fact create it, but left it with the legislative department to establish such courts as might be thought necessary, and assign them their jurisdiction.

"It can not be pretended that the case falls under the latter clause of the section, 'such other jurisdiction as is now by law conferred on the present Supreme court.' This Constitution was framed and adopted in 1834, and the charter under consideration was passed in 1843. No such jurisdiction was given over corporations by any general act before that time, and if it had it would not now exist. . . .

"It follows that the eleventh section of the charter of the Bank of East Tennessee is unconstitutional, and, consequently, the motion is refused." **37**, 575. *The State v. Bank of East Tennessee.* 1858.

Doctrine Established by the Above Three Decisions Restated—Code Provisions—Judgment Based on a Judgment.—After reviewing the opinions in the cases of The State *v.* Bank of East Tennessee, Miller *v.* Conlee, and Waters *v.* Lewis, DAVID CAMPBELL, Sp. J., said: "The result of these decisions are these: 1. That the legislature has no power to confer upon the Supreme court original jurisdiction in any case. 2. That the latter clause of the second section of the sixth article of the Constitution was not even intended to give the legislature the power to confer upon the court original jurisdiction of those cases, of which it had such jurisdiction in 1834, but was designed to confine the clause to such powers as, though not appellate, were absolutely necessary in carrying

out and completing the appellate jurisdiction given by the first clause of the second section; and 3d, that the court has no jurisdiction of a motion of one co-security for judgment against another. The provisions of the Code are in strict accordance with the results of these decisions. . . . The powers conferred upon this court by the provisions of these sections, [1] 4498, 4499 and 5000, are the powers incident to its appellate jurisdiction of this court, and absolutely necessary in carrying out and completing that jurisdiction, and were possessed by it when the Constitution of 1834 was adopted. The sections create and confer no original jurisdiction upon the court. The thing this court is now asked to do is not an incident of its appellate jurisdiction in the case of James H. Thomas et al. *v.* William Cullom. That case has passed into judgment, and is finished. The thing now urged to be done is a distinct, independent, collateral thing. It is not to render judgment upon a bond, taken in progress of that cause, but to give a judgment, based either upon the judgment given in that cause in the court below, or upon the judgment given here, in the part of that case brought up to this court. The provisions of the law have conferred upon this court no jurisdiction to give such a judgment, and this court must, therefore, overrule the motion made." **42**, 572. *Ward v. Thomas.* 1865.

Appellate Jurisdiction—Meaning of this Clause Regarded as Settled.—McFARLAND, J., reviewed and approved the several opinions on this subject above contained, and said: "These authorities settle the meaning of the clause in question in the Constitution of 1834—that the jurisdiction of this court is appellate only, with such other powers as, though not strictly appellate, are yet absolutely necessary in carrying out and completing the jurisdiction given. The convention of 1870 adopted in the new Constitution the precise language in question, without alteration in this respect, and we must suppose they did so in view of the construction given to it by the courts, as has been shown. The meaning of this clause must, therefore, be taken as settled." **59**, 214. *Memphis v. Halsey.* 1873.

Incidental Jurisdiction.—NICHOLSON, J., held: "The jurisdiction of this court is appellate only, with such incidental jurisdiction as is necessary to consummate its decrees and judgments." **65**, 96. *Chestnut v. McBride.* 1873.

"Appellate Only" Emphatic Words—Doctrine Reaffirmed.—COOPER, J.: "The Constitution of 1834 contained the same provision, which came before our predecessors for construction. They held that the emphatic words of the clause were the words 'appellate only,' and that the latter part of the sentence should be limited to such powers as,

[1] T. & S., same sections; M. & V., 5218 et seq.

though not appellate, were absolutely necessary to the exercise of the appellate jurisdiction given. Miller *v.* Conlee, The State *v.* Bank. By a well-known rule of constitutional and statutory construction, the provision thus construed must be held to have been brought forward into the new Constitution with the meaning judicially put upon it. And so it has in effect been decided. Newman *v.* Justices, McIntosh *v.* Paul, 7 Lea, 45. The jurisdiction of the court has been made appellate only, as was well said in Miller *v.* Conlee, because it was intended that the litigant in any judicial proceeding should have the benefit of the decision of at least two distinct tribunals, one created by the legislature, and the other by the Constitution. This court has considered it to be its duty to effectuate the constitutional intent, even when the case might well fall under the latter part of the clause of the Constitution in question as construed." **80**, 732. *Dodds v. Duncan.* 1884.

Appeals from Division Where Tried.—SHACKLEFORD, J., held: "That in agreed cases, an appeal may be taken from the decision of the inferior court, and that the Supreme court, sitting at Knoxville to try cases for the eastern division, can not take jurisdiction of a cause originating in the western [1] division." **43**, 249. *Memphis Freight Co. v. Mayor etc. of Memphis.* 1866.

Meaning of Constitutional Provisions, Sections 1 and 2—Mode of Exercising Jurisdiction Regulated by Legislature—Exceptions.—FREEMAN, J.: "By Constitution of State, art. 6, sec. 2, it is provided that the 'jurisdiction of this court shall be appellate only, under such restrictions and regulations as may, from time to time, be prescribed by law;' and, by sec. 1 of said article, this court is provided for as the Supreme court, and other courts that the legislature may, from time to time, ordain and establish, are denominated inferior courts. We think the fair and legitimate meaning of these last provisions is, that this court is the supreme tribunal of the State, and other courts inferior in the sense of being subject in their action to the jurisdictional control of this court, as the appellate tribunal, over all such judgments and decrees as they may render affecting the life, liberty, property or rights of the citizens of the State. The particular mode in which this jurisdiction may be exercised, whether by appeal in the nature of a writ of error, or by writ of error and *supersedeas*, is a matter of regulation by the legislature; and such restrictions and regulations may be enacted by the legislature as may be deemed proper, so as not to defeat the ultimate control of this court, as the Supreme court of the State, over the inferior courts ordained by the legislature. Perhaps there may be exceptions to the generality of the rule above stated, as in case of writ of *habeas corpus*, and it may be in some other cases—but if so, they

[1] T. & S., 4496; M. & V., 5246.

are but exceptions growing out of the particular nature of the case, and do not in any way affect the soundness of the rule itself." 52, 704. [1]*Hundhausen v. Insurance Co. et al.* 1871.

Agreed Case.—COOPER, J., held: "An agreed case cannot be brought into this court for discussion until after judgment by the inferior court."[2] 80, 657. *Aldrich v. Pickard.* 1883.

Appeal in Forma Pauperis to Supreme Court.—COOK, J., held: "Taking the oath prescribed for poor persons in cases of appeal, and tendering it to the clerk, though he refuse to accept it, is a substantial compliance with the requirements of the law, and the appeal is thereby perfected. The Act of the legislature of March 2, 1885, chapter 27, is an attempt to confer original jurisdiction upon the Supreme court, and is therefore unconstitutional and void." In delivering the opinion he said: "The section of the act in question which requires this court to try an issue *in pais*, made for the first time in this court, upon the original depositions taken at will by the parties, and filed as evidence in this court, and which proceedings constitute no part of the record of this court below, is, as we think, under the authority of the above-cited cases, too clearly a requirement of the exercise of original jurisdiction to admit of further discussion. It is insisted, however, that this is saved by the latter part of said clause of the Constitution: 'It (this court) may possess such other jurisdiction as is now conferred by law on the present Supreme court.' And it is said the Act of 1821, ch. 22, sec. 5 (Code, sec. [3]3149, T. & S.), which was in force at the time of the adoption of the present Constitution, as well as that of 1834, conferred the jurisdiction contended for upon this court. . . . This provision appears in the chapter of the Code making provisions for costs on the institution of civil actions, and applies only to the inferior courts, and the Act of 1821, from which it is taken, was merely providing for the prosecution of suits *in forma pauperis*, when the parties instituting such suits were unable, by reason of their poverty, to bear the expenses of the suit, and which, by numerous decisions of this court, is held to apply to appeals which may be taken in the lower courts in lieu of the bonds which otherwise are required to be there executed." 84, 124. *The State for use etc. v. Gannaway et al.* 1885.

Mandamus Against Circuit Judges.

Mandamus—Power of the Supreme Court to Issue Against Circuit Judges.—SHACKLEFORD, J.: "This is the first application, so far as we have been able to learn from the reports of the decisions in this court, in the judicial history of the State, of an application to this court to award a *mandamus* against a circuit judge to compel him to appear and

[1] See same case, art. 6, sec. 11. [2] T. & S., 4497; M. & V., 5247. [3] M. & V., 3195.

show cause why he should not sign a bill of exceptions taken in the trial of a cause before him. It is a question of great importance to the citizens. If this court has not the jurisdiction to grant the writ, there should be some legislative action, for without it the citizens or suitors would be without remedy, as we have no statute authorizing a *mandamus* against a circuit judge in such cases. Section 2968 of the Code provides: 'The facts of the case being fairly stated in the bill of exceptions, the judge shall sign the same, which, thereupon, becomes a part of the record of the cause.'

"A *mandamus* is defined to be, by the common law writers of England, 'a summons, issuing in the king's name, from the court of king's bench, and directed to any person, corporation, or inferior court of jurisdiction within the king's dominions, requiring them to do some particular thing therein specified, which pertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant with right and justice.' Blackstone adds: 'It issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed.' 3 Blackstone's Commentaries, 110; 5 Pet., 191. Chief Justice Marshall, in the last case referred to, says: 'We think it apparent that this definition, and this description to which it is applicable by the court of king's bench, as supervising all inferior tribunals, extends to the case of the refusal by an inferior court to sign a bill of exceptions, when it is an act that pertains to their office and duty. Though this right was never exercised by the court of king's bench in issuing a *mandamus*, yet the power clearly existed.' This Supreme court was established by the Constitution in 1834, and it is provided in the Constitution 'it shall possess such appellate and other jurisdiction as is now conferred by law on the Supreme court, under such restrictions and regulations as may, from time to time, be prescribed by law.' Previous to the formation of this court by the Constitution, the Supreme court was created by legislative will, and, in 1809, by an act of the legislature, the Supreme court was organized with appellate jurisdiction.

"The provision of the Constitution of the State in organizing this court is very similar in language to the Constitution of the United States under which the Supreme court is established. In the cause referred, of *ex parte* Crane, in which this provision of the Constitution of the United States was under consideration, the court says: 'A *mandamus* to an inferior court of the United States is in the nature of an appellate jurisdiction.' The case now under consideration is to compel a circuit judge to sign a bill of exceptions to make it a part of the record of the case of which we have now the jurisdiction. The object and purpose of the writ is to carry out and perfect the right of the party appealing. The law authorizes the appeal. Upon the execution of the bond and

filing of the record this court acquired jurisdiction. Upon it appearing the circuit judge refused to do that which he is compelled to do by law, this court, upon principle, must have the power, under its appellate jurisdiction, to compel the circuit judge to appear and show cause why he has not performed an act he is bound by law to do. The act to be performed is a ministerial one, not judicial. Without the exercise of the appellate jurisdiction there is no remedy. In criminal cases the liberty of the citizen would be in jeopardy, and the rights of the property would be under the control of the circuit judges if they refused to sign bills of exceptions, from time to time, that might be presented on the trial of the cause, and to which the suitors by law were rightfully entitled to make a part of the record.

"As much as we are disposed not to exercise a jurisdiction where a doubt exists, yet where the rights or liberty of the citizen would be placed in jeopardy, we think it our duty to take jurisdiction. In a case that came before the Supreme court in 1816, of which there is but a short note, on a petition for a *mandamus*, to compel the circuit judge to proceed to the trial of a cause, the court held: 'They had no original jurisdiction, and they would not take cognizance of any matter, unless it relates to *an appeal, which, if prayed and attempted to be defeated in any way, this court would aid by any writ which would overcome and remove the injury.*' 5 Haywood, 59. In the case of Miller *v.* Rogers, 9 Humph., 236, TURLEY, J., in commenting upon the facts, where it was urged the judge had refused to incorporate into a bill of exceptions parts of the evidence, said: 'We must examine the facts here, as contained in the bill of exceptions, and not upon a suppositious conception of what they might have been if the bill of exceptions had been drawn up as it should have been. If a judge refuses to sign a bill of exceptions, it is no cause of error; the only redress is by *mandamus*. In a case properly made out *a fortiori* is this so when he will sign an imperfect bill of exceptions, and none other.'

"Judge Caruthers, in his 'History of a Lawsuit,' 259, in commenting on this principle, says: 'If the judge refuses to sign it, the remedy of the party is to apply to the Supreme court for a *mandamus*. So, if he refuses to insert in it what the party contends was really the fact, his only remedy is, a *mandamus* to compel him.' Though this has not the force of a judicial decision, yet the large experience of the author with the jurisprudence of the State, and his high character as a jurist, gives weight to his opinion upon this question. The right has been frequently exercised by the Supreme courts of other States. In New York, the question was fully argued before the Supreme court of that State, and the writ was awarded. 6 Johnson's Rep., 279. In 2 Scamman's Ill. Rep., 189, a case came before that court. The question was well considered, the authorities were reviewed, and upon mature deliberation,

as appears from the great number of authorities cited, the writ was awarded. But, not having the Constitution of those States before us, we can not say whether the courts had only appellate jurisdiction. We are of opinion, under the appellate powers of this court, it has the right to award the writ of *mandamus*." **43**, 259. *The State for use etc. v. Hall et al.* 1866.

Mandamus Against Circuit Judge—When it Will be Refused—Right to Award Original Process.—SNEED, J., held: "The power of this court to award original process is limited to those cases where its exertion is required to carry out its appellate jurisdiction. . . . A *mandamus* to compel an inferior judge to proceed to the trial of a cause disallowed, because, if granted, such action would involve the exercise of original jurisdiction." **65**, 6. *The State ex rel. Kain v. Hall.* 1873.

Authority of Supreme Court to Order Clerk of Inferior Court to Execute Order of Sale—Judge and Clerk of Inferior Court—Art. 6, Sec. 3.—The question considered here was the constitutionality of the Act of March 24, 1879, providing that in all cases where land is decreed for sale by any inferior court and an appeal taken and the judgment below affirmed, the case shall be sent back to the lower court and the clerk of said inferior court shall be ordered by the Supreme court to execute the order of sale and report at the next term of the inferior court. L. D. MCKISICK, Sp. J.: "Prior to the passage of the act in question it was the ordinary course and practice of this court, in its discretion, either to remand the cause to the inferior court to be proceeded in, in conformity with the opinion and decree of this court, or to execute the decree of affirmance through the clerk of this court. . . . When the Constitution of 1870 was adopted the extent of the jurisdiction of this court had been defined by a number of acts of the legislature, which had been carried into the Code of 1858, and was to be found in sections [1]4495 to 4502 inclusive, and the practice in this court had been prescribed and regulated by various acts carried into the Code at sections 4504 to 4516 inclusive, and in various sections to be found in the chapter entitled 'Proceedings for the correction of errors.' Whatever jurisdiction, if any, those sections conferred upon the Supreme court as it existed when the Constitution of 1870 was adopted, this court is expressly authorized[2] to exercise under the latter clause of the second section of article 6. But it is conceded that that section does not authorize the legislature to confer any new original jurisdiction upon this court. It can only prescribe restrictions and regulations for the exercise of its appellate jurisdiction; and the question is, whether the act under consideration merely prescribes a mode for the exercise of that appellate jurisdiction in the class of cases to which it applies, or

[1] M. & V., 5215 et seq.

[2] Art. 6, sec. 3.

whether it goes further and attempts to enlarge or abridge that jurisdiction. . . .

"It appears to be plainly the intention and meaning of this act to direct this court to order the clerk of the inferior court to execute a decree of this court, and not the decree of the court of which he is clerk. Manifestly this court has no jurisdiction to do anything of the kind. As we have seen by the express provisions of the Constitution, the office of clerk of the various courts is created by the Constitution, each court has its own clerk, and has jurisdiction over that clerk; but we have no provision in the Constitution, nor in the statute law, which gives jurisdiction to any court over the clerk of another court. Such a law would be an anomaly, calculated to lead to inextricable confusion in the administration of justice. While this court has no jurisdiction over the clerks of inferior courts, simply as clerks, it has jurisdiction over the inferior courts and the judges thereof, in all cases wherein it has appellate jurisdiction of the parties and of the subject matter, and can compel the inferior court or the judge thereof to obey its mandates."

The opinions in Perkins *v.* Scales and Mabry *v.* Baxter are cited and discussed and the judge continues: "The foregoing decisions do not in any way question the power of the legislature to prescribe such rules as may be necessary to carry out the provisions of sec. 2 of art. 6 of the Constitution. That the legislature has the power to prescribe such rules as may be necessary to enable this court to exercise its appellate jurisdiction is not questioned, but after that jurisdiction has once rightfully attached, under such rules as may be prescribed by law, this court as a co-ordinate branch of the State government, under the Constitution, has power to make and enforce its decrees without any directions from the legislature. The conclusion is, that notwithstanding the Act of March 26, 1879, this court may, in its discretion, allow the decrees submitted by the complainants to be entered, the parties interested so desiring, and there being no special cause shown for remanding the causes, the motions are allowed, and the decrees will be entered accordingly." **70**, 606. *Northern v. Barnes, The State v. Williams.* 1879.

Court of Chancery Appeals — Decree May be Signed by Only Two Judges.—WILKES, J., held: "A decree of the court of chancery appeals which recites a hearing and concurrence by the full court, is not erroneous and reversible because the opinion and finding of facts upon which the decree is based was signed by only two judges. Nothing in the Constitution or [1]statutes requires the signing of the opinion or the concurrence of more than a majority therein." **95**, 598. *Austin v Harbin.* 1895.

[1] Acts 1895, ch. 76.

ART. 6, SEC. 3. The judges of the Supreme court shall be elected by the qualified voters of the State. The legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section 2 of this article. Every judge of the Supreme court shall be thirty-five years of age, and shall, before his election, have been a resident of the State for five years. His term of service shall be eight years.[1]

[Amendment of 1853, Sec. 3. "The judges of the Supreme court shall be elected by the qualified voters of the State at large, and the judges of such inferior courts as the legislature may establish shall be elected by the qualified voters residing within the bounds of any district or circuit to which such inferior judge or judges, either of law or equity, may be assigned, by ballot, in the same manner that members of the general assembly are elected. Courts may be established to be holden by justices of the peace. Judges of the Supreme court shall be thirty-five years of age, and shall be elected for the term of eight years."]

[Const. 1834, Art. 6, Sec. 3: "The general assembly shall, by joint vote of both houses, appoint judges of the several courts of law and equity, but courts may be established to be holden by justices of the peace. Judges of the Supreme court shall be thirty-five years of age and shall be elected for the term of twelve years."]

[Const. 1796, Art. 5, Sec. 2: "The general assembly shall, by joint ballot of both houses, appoint judges of the several courts of law and equity; also an attorney or attorneys for the State, who shall hold their respective offices during good behavior."[2]]

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[1] See L. & N. R. R. *v.* Davidson County, art. 2, sec. 29, p. 335; The State *ex rel. v.* Maloney, art. 7, sec. 5; Northern *v.* Barnes, art. 6, sec. 2, p. 424; also **74**, 638.

[2] In the case of Smith *v.* Normant, **13**, 271, decided in 1833, CATRON, J., held: "Under the Constitution of 1796, the Act of 1827, 37, authorizing the governor to appoint a special judge, in case the sickness or bodily infirmity of any circuit judge should render him incompetent to sit without danger to his health or life, is unconstitutional and void. See The State *v.* Simpson, 5 Yer., 365; Brogan *v.* Savage, 5 Sneed, 694; Venable & Co. *v.* Curd, 2 Head, 586, all citing this case, the last strongly intimating that it was erroneously decided by overlooking the doctrine applicable to acts of officers *de facto*. The Constitution of 1834 made, and the present Constitution of 1870, art. 6, sec. 11, makes provision for the contingency." See also **14**, 529.

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ART. 6, SEC. 4. The judges of the Circuit and Chancery courts, and of other inferior courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every judge of such court shall be thirty years of age, and shall, before his election, have been a resident of the State five years, and of the circuit or district one year. His term of service shall be eight years.[1]

[Amendment of 1853: Sec. 4: "The judges of such inferior courts as the legislature may establish shall be thirty years of age, and shall be elected for the term of eight years." Const. 1834, Art. 6, Sec. 4.]

[Const. 1796, Art. 5, Sec. 4: "The judges of the superior courts shall be justices of oyer and terminer and general jail delivery throughout the State."]

Special Judge May Be Selected by Agreement of Parties when Regular Judge is Incompetent.—Judge Turley, being incompetent to try this cause, the attorneys by agreement selected F. M. Fulkerson, Esq., to preside, under the provision of the [2]Act of 1858, ch. 90. CARUTHERS, J.: "It is argued that this act is unconstitutional, because a judge can not be appointed but in the mode therein prescribed; that it is in contravention of this provision for the parties to make a judge by agreement. But this act does not authorize the parties to make a judge, but only a person 'to act as judge,' in their particular case, in which the judge of the circuit is incompetent. If the provision had been that in such cases the parties might, by agreement, select some attorney to decide their dispute or to preside over twelve other men who should decide upon the facts, under his instructions as to the law, could there be any objection? Can it make any difference in the case whether he is denominated umpire, arbitrator, or judge? But if there was any thing in the name, he is not so entitled in the law, but only that he is to 'act as judge.' That is, the powers that a judge would have and exercise in the particular case, are conferred, by agreement of the parties, upon the person thus selected. It can make no difference that the regular machinery of the court is to be used in the case, under the direction of such person. It is all by agreement; there is no compulsion. It is confined to a special case, in which the regular judge can not legally preside.

"It can not affect the question that the case is to be tried and decided in the court house, in term time, with a jury, and a clerk and sheriff. He is not a judge, nor are gentlemen appointed to fill the place of one

[1] See State etc. v. Gaines, art. 6, sec. 1, p. 406; also 70, 177, Acts of 1879, ch. 180, and 80, 350.
[2] Code 1858, 3921; T. & S., 3921; M. & V., 4682.

or more members of this court, who are incompetent, judges; but they are, by the law, clothed with the same powers for the peculiar cases. They are to 'act as judges;' they are to have the power and authority of judges in the cases to be tried before them. Under this act the plain and easy mode of correcting errors may be resorted to which applies to ordinary cases. In this it is better for the parties than arbitrations. The case of [1]Smith *v.* Norment is very different from this. There the Act of 1827, ch. 37, was declared unconstitutional. The act gave the governor power to appoint a special judge to exercise all the powers of a circuit judge, in case of his sickness, until he should recover and resume his functions. Even in that case Judge Green dissented, and held the act to be constitutional. Yet we hold the case to be authority, and still it does not control this case. They are entirely dissimilar. The selection of the attorney to preside in this case was made by the attorneys of the parties, or at least the written agreement is signed by them. We see no objection to this. They were employed to conduct the suit, and might well be considered better judges than their clients of the qualifications of lawyers. We do not perceive that the evil consequences to the judiciary, depicted in argument, will arise from this act. But whether such may be the case or not, believing the act to be within the legislative power, we are bound to give it effect. The act is confined to cases where the regular judge is incompetent, and to that we limit our opinion." **37**, 693. *Brogan v. Savage et al.* 1858.

Special Judge—Official Acts Can Not be Inquired Into by Parties Affected by Them.—CARUTHERS, J.: "The plaintiff in error was presented for unlawful gaming, at the October term of the Circuit court of DeKalb for 1858. That term of the court was held by John P. Murry, who had been appointed by the governor to fill the vacancy occasioned by the death of Hon. John L. Goodall, until the election was made by the people. At the February term, 1859, upon his arraignment, he filed a plea in abatement that the said John P. Murry, who presided at the term of the court at which he was presented under the *pro tem.* appointment of the governor, was under thirty years of age, and therefore not competent to exercise the functions of judge of the Circuit courts in this State. A demurrer to this plea was sustained by the court, and that is the error assigned for reversal.

"It is true the Constitution requires a circuit judge to be thirty years of age, but if the appointing power confers the office upon one who is not competent, by that test the question is as to the effect upon his judgments while he occupies and acts in the position. We think it is well settled that the judgment and official acts of an officer *de facto* are binding and valid, and the competency of the functionary acting

[1]Note to art. 6, sec. 3.

under commission can not be inquired into by parties affected by them. This principle was adopted through necessity to save the rights of persons having an interest in them, and to prevent a failure of justice. The doctrine is referred to and recognized in Moore *v.* The State, 5 Sneed, 514, and an unreported case here at the last term at Jackson yet in manuscript. This renders it unnecessary, if not improper, to enter again into the argument and citation of authorities. The governor's commission renders the functionary competent, and clothes him with powers of the office so far as his official acts are brought in question by the parties concerned in or affected by them. He may be removed from the office, and his powers terminated by the proper proceedings, but until that is done his acts are binding." **40**, 691. *Blackburn v. The State.* 1859.

County Judge is an Inferior Judge—County Judgeship Not a "County Office"—Vacancy—How Filled—Art. 11, Secs. 1 and 17—Art. 7, Sec. 1. —In August, 1871, a vacancy occurred in the office of county judge of Davidson county, to fill which the governor appointed the relator, and the County court elected the defendant. Who was entitled to the office? After reviewing the various statutes providing for the filling of vacancies, before the adoption of the Constitution of 1870, McFARLAND, J., sums up: "We conclude, therefore, upon the construction of the [1]statutes before referred to, that upon the happening of a vacancy in the office of county judge it was the duty of the governor to order an election to fill the vacancy, and in the meantime to appoint some suitable person to fill the office until the election was held. . . . The important change in this respect, made by the new Constitution, is that it abolished special elections for the filling of vacancies. The vacancy can not be filled by an election until the next licensed election for civil officers, and the result is that where an appointment to fill such a vacancy is made, the appointee is to hold the office until the next biennial election for civil officers, so that his length of time to remain in office is greatly extended. Section 1 of article 11 of the Constitution of 1870 provides, 'that all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the legislature;' so we think it clear that if the power existed in the governor to make this appointment previous to the adoption of the new Constitution, it still remained unless taken away by the last section—sec. 17, art. 11, in these words: 'No county office created by the legislature shall be filled otherwise than by the people or the county court.' . . . The Constitution, art. 7, sec. 1, designates certain county officers and provides for their election and the filling of vacancies in their offices;

[1] M. & V., 353.

these are the sheriff, trustee, coroner, register. These are clearly county offices proper. Their term of office, except in the case of register, is two years; the register's term is four years. They are not required to be commissioned by the governor; their duties are ministerial, and in all cases confined to their county.

"Now, does a county judge fall more clearly within this class than the judiciary? He is elected by the people of the county, and in general his powers and duties are confined to his county, though he may interchange with other county judges and hold court in any of the counties for which a county judge is provided by law. He is the general financial agent and accounting officer of the county, and in this respect his duties are those of a county officer; but these are not all of his duties, and they do not seem to have any very close connection with his judicial powers in hearing and determining causes in court, but are rather powers and duties added to his office of judge. On the other hand, as we have seen, he is required to be learned in the law; he is to be commissioned by the governor and qualified as other judges, and he holds his office for eight years, as they do. His court is one of record and exercises, in many cases, concurrent jurisdiction with the Circuit and Chancery courts, and from the judgments and decrees in these cases appeals and writs of error lie to the Supreme court. In other cases the jurisdiction of the court is original and exclusive; the judgments and decrees of the County court, held by the county judge, in causes over which it has jurisdiction, have all the force and effect of the judgments or decrees of any other court, and while in one sense he may be a county officer, yet we can not resist the conclusion that he is nevertheless a judge.

"So we do not think that county judges are so clearly included within the terms of sec. 17, art. 11, as above quoted, as to amount to an absolute prohibition upon the power of appointment, unless this view be aided by some other provision. Or, in other words, that if the power of appointment can be shown to have belonged to the governor previously thereto, then the provision in question does not take it away in such plain and positive terms as to leave no doubt of its meaning. It would seem to be very clear that as the election of county officers then in existence had already been provided for by law, this clause of the Constitution was intended to have more special reference to offices afterwards to be created by the legislature, although it will include within its meaning 'all county offices created by the legislature,' and must be so construed. It is evident, however, that in the case of a county office hereafter created by the legislature, that body must determine how such office is to be filled, whether by the people or the County court; for although this clause of the Constitution does say that the office shall be filled otherwise than by the people or the County court,

yet it does not say in which one of the two modes the office is to be filled, and it is clear that in such a case there must of necessity be legislation upon the question before this provision could be fully carried into effect, and, in some cases, a serious difficulty might arise as to whether the power was to be exercised by the County court held by the judge, or the Quarterly court held by the justices; the clause only says the County court.

"It is true that if the provision in question was a clear prohibition upon the exercise of the power of the governor, it might have the effect to prevent the exercise of the power upon his part, without vesting the power elsewhere. It might have been said that the governor should not exercise the power, without saying who should. . . . Sec. 4, art. 6, provides that the judges of the Circuit and Chancery courts and of other inferior courts shall be elected by the qualified voters of the district or circuit to which they are to be assigned, and, as we have seen that, even if it be conceded that for some purposes a county judge is a county officer, he is at the same time a judge of an inferior court, we think he comes clearly within the meaning of the clause last quoted, and the legislature would not have the power to provide for the election of a county judge otherwise than by the people.

"According to the argument for the defendant, sec. 17, art. 11, applies in most cases not only to filling the office in the first instance, but also as to filling temporary vacancies. No distinction in this respect is made in this clause, although it is clear that the two powers must be different; for under another clause in the Constitution, no special election can be held, and so no such vacancy can be filled by the people. Yet, this clause makes no distinction between filling the office and filling the vacancy. Assume, for argument, that sec. 17, art. 11, may include a county judge—does it prohibit a temporary appointment by the governor until the next election? It says the office shall not be filled otherwise than by the people or the County court. Other portions of the Constitution provide that the judge of the Circuit and other courts shall be elected by the people. This is certainly equivalent to saying that the office shall not be filled otherwise than by the people, and the Constitution has no provision for the filling of a vacancy in the office of a judge by an appointment of the governor, but it does contain a provision, that the election of all officers, and the filling of vacancies not otherwise directed or provided for by this Constitution, shall be made in such manner as the legislature may direct, and under this power the legislature directs the appointment to be made by the governor, and this power of appointment as to other judges has never been doubted. The provision that the office shall only be filled by the voters, has not been supposed to take away the power of the governor to fill a temporary vacancy. Now, the Constitution has not otherwise directed or provided

for the manner of filling a vacancy in the office of county judge, and we think the power to provide for filling the vacancy must, under the Constitution vest with the legislature, and as the law stood in August, 1871, that power was vested in the governor." **54**, 488. *The State ex rel. Smiley v. Glenn.* 1872.

County Judge—Removal of—This Clause Construed—Former Opinions Discussed.—By the Act of 1885, p. 128, the legislature created the office of county judge of Marshall county. Lenoard was appointed, etc., and was elected in August, 1886. This bill was filed on relation of D. C. Orr to restrain him from acting as judge on the ground that the act, in so far as it authorized the appointment of judge, had been repealed by the Act of 1887, p. 163, and the powers and duties of the office devolved upon him (Orr) as chairman of the County court. SNODGRASS, J.: "The question is, can the legislature subsequently, and within the term, deprive him of the office by devolving its powers and duties upon another? The Act of 1887 did not and did not attempt to abolish or diminish the powers and duties appertaining to the office. It simply repealed so much of the act as applied to Marshall county (another county having had a similar change made in its court system by the same act), and undertook to re-establish the office of chairman of the County court after the first Monday in April, 1887, and to vest in this officer 'all the rights, privileges, jurisdiction, duties, and powers' pertaining to the office as established and exercised by the county judge.

"If this legislation had merely named the defendant, and by name and title removed him from the position and given it to another, it could not have more directly accomplished the purpose actually effected, if it be valid. The Constitution, in fixing the terms of the judges of inferior courts, elected by the people, at eight years, intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being subservient to any power in the State, but intended also to prevent constant and frequent experimenting with court systems, than which nothing could be more injurious or vexatious to the public. It was intended when the legislature established an inferior court, that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its duration might discourage such changes as were not the result of most mature consideration. Realizing that a change, if made so as to constitute an inferior court, would fix that court in the system for eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each recurring

legislature, itself elected for but two years, the framers of the Constitution wisely guarded against these evils by the section referred to. Properly construed and enforced, it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form without force or substance, and we have all the evils and confusion of insecure, changing and dependent courts; frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits are understood. It would be a mortifying reflection that our organic lawmakers intended any such result in their avowed effort to make a government of three distinct and independent departments; and still more humiliating if we were drawn to the conclusion that while they did not intend it, they had been so weak or inapt in phraseology adopted as to have accomplished it. Neither the intent nor the language of the Constitution employed to express it fortunately bears any such construction. When a court, whose judge is elected by the people of one or more counties—in district or circuit—is constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the powers and emoluments of office during the term of eight years by devolving these intact upon another, or otherwise. The court so constituted, and judge elected in this instance, was under the authority to establish inferior courts already quoted."

Referring to State *ex rel.* Coleman *v.* Campbell (MS.) and [1]State *ex rel. v.* Gaines, Judge SNODGRASS said: "Without desiring to be understood as assenting to the correctness of the conclusions reached in those cases (to the reasoning of which we do not subscribe), and which conclusions, we may remark in passing, were reached by a divided court, and against the weight of many opinions in other States, it is sufficient to say that the case here presents no such question as that determined there." 86, 487. *The State v. Lenoard.* 1888.

[1] Art. 6, sec. 1, p. 406.

ATTORNEYS GENERAL.

ART. 6, SEC. 5. An attorney general and reporter for the State shall be appointed by the judges of the Supreme court, and shall hold his office for a term of eight years. An attorney for the State for any circuit or district for which a judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the State five years, and of the circuit or district one year. In all cases where the attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore.*[1]

[Amendment of 1853, Art. 6, Sec. 5: "An attorney general for the State shall be elected by the qualified voters of the State at large, and the attorney for the State for any circuit or district to which a judge of an inferior court may be assigned, shall be elected by the qualified voters within the bounds of such district or circuit in the same manner that members of the general assembly are elected; all said attorneys, both for the State and circuit district, shall hold their office for the term of six years. In all cases where the attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore.* The legislature shall appoint a day for holding the election of judges and attorney general separate and apart from the day already prescribed or hereafter to be prescribed by the legislature for holding the elections for State and county officers."]

[Const. 1834, Art. 6, Sec. 5: "The legislature shall elect attorneys for the State by a joint vote of both houses of the general assembly, who shall hold their offices for the term of six years. In all cases where an attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore.*"]

Power of Legislature to Reduce Fees of Attorney General and Other Officers.—GREEN, J.: "The plaintiff in error was indicted for gaming in July, 1841, and was tried and convicted in March, 1842. The clerk taxed a fee of five dollars to the attorney general. At the return term the court, on motion, ordered the taxation of costs to be corrected, and ten dollars to be taxed for the attorney general's fee. From this judgment the plaintiff in error appealed to this court. Previously to the passage of the Act of 1841–2, ch. 35, the sum of ten dollars was the fee allowed by law to the attorney general in all convictions for gaming, but by that act the fee was reduced to five dollars in all cases for gaming which were not made felony by statute. This act was passed the 11th of January, 1842, after the indictment was found, and before the conviction and judgment. It provides 'that whenever any judgment for a fine and costs shall be rendered in any court, against any defendant, upon any prosecution under any of the statutes which may be in force to discourage and suppress gaming, only five dollars shall be taxed in the bill of costs as a fee for the attorney general, when the same shall be prosecuted to conviction; provided, that on conviction for games made felony by law, the fee of the attorney general shall be ten dollars, to be taxed in the bill of costs and to be paid by the defendant.' The terms of this act apply as well to cases which commenced before the passage as to those which might afterwards be originated. Its words apply to the

[1] See **7**, 145; **22**, 240, 374; **34**, 56.

rendition of the judgment; the sum of five dollars is to be taxed 'whenever any judgment shall be rendered.' The argument, therefore, that the legislature meant this provision to apply to prosecutions only which should be commenced after the passage of the act, can not be maintained. All such construction is excluded by the plain words of the law.

"But it is insisted that the legislature had no power to reduce the attorney general's tax fee in cases where indictments had been found below the sum which was previously allowed by law. This proposition necessarily involves the general question whether the compensation of officers of the government may be changed, modified and reduced by the legislature, during the time for which such officers may have been appointed. And there can be no doubt but that such power exists, except in particular cases, where by the Constitution it is expressly prohibited. The law fixing the compensation to be allowed for the discharge of the duties of an office does not constitute a contract with the officer who may be appointed, within the meaning of the Constitution of the United States. He takes the office with the liberty to relinquish it at any time he thinks proper, and with the understanding that his compensation is subject to legislative control. If this were not so, all those provisions in the Constitution which prohibit the legislature from reducing the salaries of certain officers are unnecessary. But the introduction of such provisions in the Constitution shows the sense of that instrument as to those offices in relation to which no such provision exists. We do not perceive that the present case, where the compensation is given in certain fees attached to the office, is different from those cases where regular salaries are allowed. But it is said this cause had commenced, and a right to the fee of ten dollars had vested in defendant in the contingency of conviction. We do not think there was any vested right in this case. The Act of 1824 allowed ten dollars on conviction for gaming. The right to the ten dollars vested only on conviction, but before that occurred in this case, the Act of 1841–2 was passed, and reduced the fee to five dollars. The right to the ten dollars could never, therefore, vest. The Circuit court erred in taxing a fee of ten dollars, and the judgment must be reversed." **22**, 481. *Haynes v. The State.* 1842.

Attorney General Pro Tempore—What Order of Appointment Must State.—In this case the order appointing Washburn attorney general *pro tempore* stated only that it appeared to the court the attorney general, Murray, was "incompetent," because he had been the defendant's counsel previous to his election and qualification. TOTTEN, J.: "The question is, was this a valid appointment? The Constitution, art. 6, sec. 5, provides that 'in all cases where an attorney for any district fails or refuses to attend and prosecute, according to law, the court shall have power to

appoint an attorney *pro tempore.*' It is clear that by this clause of the Constitution two cases are provided for. First, where the regular attorney for the State *fails* to attend and prosecute. Second, where he *refuses* to attend and prosecute. In either case the court has power to make an appointment *pro tempore.* If the attorney be present in court, and *refuse* to prosecute for any cause, or without cause, the court has power to make an appointment *pro tempore;* otherwise the attorney has power by a willful act to hinder and delay public justice, to the prejudice of the State and the prisoner. But it is clear that this is one of the evils against which the Constitution intends to provide. In the exercise of the power to appoint, it is material to state in the order the facts which render it necessary, so that it may appear to be a case under the Constitution. For the court has no general power to appoint an attorney for the State, but a *special* power merely, and in its exercise the facts must appear, on the existence of which the validity of the appointment depends. Now does the order of appointment assume the existence of a case specified in the Constitution? It states that the attorney general, having been of counsel for the accused, was incompetent to perform his office, and then proceeds to make a special appointment. It does not state that he *failed* to attend and prosecute, or *refused* to attend and prosecute—the cases specified in the Constitution—but states a different case not so specified. Nor do we see that the cause stated rendered the attorney legally incompetent, or that such objection to the exercise of his office would lie against him. Certainly it was a good and sufficient reason why he should himself 'refuse to attend and prosecute'; and if he had so acted, the power to appoint was clear and explicit. But it does not appear that he either offered or refused to prosecute, or took any action in the case. We have only the action of the court, which declares him incompetent and makes a special appointment for a new *cause,* not stated in the Constitution. We think it clear that the appointment of the attorney *pro tempore* was void, and that it was good cause in arrest of judgment. The judgment will therefore be arrested and the prisoner be remanded, and be held subject to a regular and legal proceeding." **34**, 45. *Pippin v. The State.* 1854.

Attorney General Pro Tem—Appointment of—"To Attend and Prosecute."—DICKINSON, Sp. J.: "Appointment of attorney general *pro tem.* by an order reciting that it was made 'on account of sickness' of the regular attorney general, is valid and within the authority conferred by the constitutional provision empowering the courts to make such appointment 'in all cases where the attorney for any district fails or refuses to attend and prosecute according to law.' To state in the order a sufficient cause for the failure of the regular attorney general to attend, or for his failure to prosecute if present, is the same thing, in legal

effect, as to state that he failed 'to attend and prosecute.'" **89**, 547. *Turner v. The State.* 1891.

Indictment Signed by "Attorney General"—Attorney for the State.—McFarland, J.: "For at least fifty years previous to the Constitution of 1870 this officer was styled an attorney general, and the judicial decisions recognized this as the proper title. Then, was it intended by the Constitution of 1870 to change this title? It is provided, sec. 5, art. 6, 'an attorney for the State,' for any circuit or district, etc., shall be elected. This is no material change of the language of the Constitution of 1834. The acts of the legislature passed subsequently in regard to this officer, some of them styled him 'an attorney for the State,' but this was no more than had long before been done in the Constitution; but certainly no such change was made by the Constitution, nor was any such intended. Besides, the court takes judicial knowledge that A. J. Caldwell was the proper officer to prefer this indictment, and his having designated himself by the title which has been used for more than fifty years does not throw doubt upon the question."[1] **66**, 21. *Greenfield v. The State.* 1872.

Attorney General and District Attorney Convertible Terms.—Folkes, J., held that an indictment signed by the proper officer signing himself "district attorney" was good. He said: "We have already seen that this officer is referred to in the Constitution of 1834 and of 1870 as 'attorney for the State,' while a reference to our statutes shows that he is called indifferently 'attorney general' and 'district attorney.' He is called 'district attorney' in the Code at sections 5090*a*, 900, 3952*a*, 2310, 669, 3961, 5596, 5598, 5599, 5568, 1557, and many others, while in sections 317, 879, 885, 5426, 3962, 3963, 4964, 5600, and numerous others, he is called 'attorney general.' That the terms are used as convertible does not seem to admit of doubt. If there be any difference in the frequency of the use of one over the other it appears to be in favor of the 'district attorney.'" **85**, 205. *The State v. Myers.* 1886.

> Art. 6, Sec. 6. Judges and attorneys for the State may be removed from office by a concurrent vote of both houses of the general assembly, each house voting separately; but two-thirds of the members to which each house may be entitled must concur in such vote. The vote shall be determined by ayes and noes, and the names of the members voting for or against the judge or attorney for the State, together with the cause or causes of removal, shall be entered on the journal of each house respectively. The judge or attorney for the State against whom the legislature may be about to proceed, shall receive notice thereof, accompanied with a copy of the causes alleged for his removal, at least ten days before the day on which either house of the general assembly shall act thereupon.[2] [Same as Const. 1834, art. 6, sec. 6.]

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[1] T. & S., 317; M. & V., 359.

[2] See State etc. *v.* Gaines, art. 6, sec. 1, p. 406; also **88**, 754.

COMPENSATION OF JUDGES.

ART. 6, SEC. 7. The judges of the Supreme or inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office, nor hold any office of trust or profit under this State or the United States.[1] [Same as Const. 1834, art. 6, sec. 7. Const. 1796, art. 5, sec. 3, used "Superior" instead of "Supreme," and did not contain the words "or inferior" after the word "Superior," but was otherwise the same.]

Appointment of Member of Congress to be Supreme Judge.—On September 18, 1868, Horace Maynard, a member of congress, was appointed by Governor Brownlow to the vacancy occasioned by the resignation of Judge Milliken of the Supreme court. NICHOLSON, J.: "It is true, as argued, that, by the Constitution of Tennessee, art. 6, sec. 7, and the [2]Code, 748, a member of congress is disqualified for office under the State government, and is guilty of a misdemeanor in holding any such office, but it does not follow that, because Mr. Maynard, whilst a member of congress, accepted a commission, and qualified as a Supreme judge, his acceptance of that office was a nullity. The consequence was, if Governor Brownlow had the authority to appoint him, that he thereby surrendered his right to a seat in congress. It is settled, that, on the acceptance and qualification of a person to a second office, incompatible with the one he is then holding, the first office is, *ipso facto*, vacated. It operates as an implied resignation—an absolute determination of the original office. People *v.* Carrique, 2 Hill, 93; Rex. *v.* Trelleny, 3 Bur., 1616; Millward *v.* Thatcher, 2 T. R., 87; 13 Petersdorff's Abr., 3. It follows, that when Mr. Maynard was appointed as a supreme judge, he vacated his office as a member of congress and became a judge of the Supreme court, provided Governor Brownlow had any authority to make the appointment; nor does the fact that Mr. Maynard continued to serve out his time as a member of congress, affect the question before us. That was a matter entirely for the adjudication of congress." 48, 764. *Calloway v. Sturm.* 1870.

Salaries of Judges — Special Judge.—The [3]Act of 1873, providing that the special judge should be paid out of the salary of the regular judge, was declared unconstitutional. FREEMAN, J., in delivering the opinion, said: "We understand the above clause to mean that the salaries are to be fixed by law, ascertained beforehand and made certain, so that the judge who accepts the office may then know what he has to depend upon for his support, and may reliably expect to receive it while he fills the office. But it is said that the judge had notice of this law, and knew what to expect. True, he had notice of the act, but if it was in

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[1] See The State *v.* Gaines, art. 6, sec. 1, p. 406.
[2] Code 1858, M. & V., 936 et seq.
[3] T. & S., 3930*a*; M. & V., 4695.

conflict with the Constitution he was not precluded from relying upon the Constitution in preference to the act. . . . Their compensation is required to be ascertained by law, previously ascertained, for it can not be changed during the term. In this case, if this law be valid, the salary was not ascertained; it depended upon the judge's subsequent good fortune and other uncertain events. If he fell ill, and needed his salary thereby all the more urgently, he might, nevertheless, have none if a special judge were elected. We concede that if this be the law, then no matter how exacting, it must be enforced; but we hold that it is not the spirit of the Constitution. The salaries of the judges have not been reduced in the sense of the Constitution; yet the act requires a portion of the salary of a judge who may be unfortunate to be deducted and given to some one else, to pay him for doing the work which the judge ought to have done. Does the Constitution require any man to accept an office of this character upon such a provision? We think certainly not. It was not intended to pay the judges according to their physical ability, or to make their compensation depend upon contingencies so uncertain—at least when they have been in no default." 59, 601. *Burch v. Baxter.* 1873.

Reasons for This Provision—Judges' Salaries—Time and Term.—The legislature, by ch. 3, Acts 1879, reduced the salaries of all judges thereafter appointed or elected from $2,500 to $2,000. Horrigan was appointed afterward, on August 1, 1879. McFarland, J.: "The argument is that this clause was intended to prohibit the increasing or diminishing of a judge's salary during the *term* for which he is elected. That is to say, as the judicial terms are eight years, and the terms of all judges begin and end at the same time, it was the intention that all judges holding during the *term* should have the same salary, and that the salary should not be increased or diminished during the *term;* that the judges who are elected or appointed to fill out unexpired terms stand, in all respects, in the place of the judges whose *term* they are elected or appointed to fill. This construction would be desirable in some respects, and would avoid the incongruity indicated, but would require a departure from the plain meaning of the words used. If the purpose of the framers of the Constitution had been as indicated, it would have been easy to use language clearly expressing such intention, but the language is, that the compensation shall not be increased or diminished during the *time* for which they are elected. This obviously means during the time and not the term for which the judge is elected. We are not at liberty to strain the language in order to reach a construction that may comport with our notions of justice to the particular judge, or to avoid incongruous results. We must give effect to the clearly expressed intention, whatever may be the consequences. Furthermore, looking to the reasons upon which this clause of the Constitution was doubtless adopted, it

must be apparent that the object was to prevent the increase or diminishing of a judge's salary *while he is in office*, so as to relieve him, as far as possible, from improper influences, and promote an independent discharge of his duties.

"If the change takes place before the judge is elected or appointed, the evils intended to be guarded against can not well result as to him. He accepts the office with a knowledge of the salary as fixed, and no injustice is done him. The language of the Constitution is unambiguous, and its plain meaning must prevail. It is not denied that the act in terms applies to all judges elected or appointed after its passage." FREEMAN, J., dissented. **72**, 613. [1]*Gaines, Compt. v. Horrigan.* 1880.

County Judge an "Inferior" Judge—Salary of.—COOPER, J., held: "A county judge is an inferior judge within the meaning of the Constitution, so far as he is clothed with judicial power, and his salary can neither be increased nor diminished during the time for which he is elected, but he is also the accounting officer and general agent of the county, and compensation may be made him therefor under the authority vested in the Quarterly court by statute,[2] and their judgment when exercised can not be controlled by any other tribunal." **76**, 24. *The State ex rel. Puckett v. McKee et al.* 1881.

ART. 6, SEC. 8. The jurisdiction of the Circuit, Chancery and other inferior courts shall be as now established by law until changed by the legislature.[3] [Const. 1834, art. 6, sec. 8: "The jurisdiction of such inferior courts as the legislature may from time to time establish, shall be regulated by law."]

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[1] See same case, art. 2, sec. 18, p. 298. [2] T. & S., 316; M. & V., 353.

[3] See Jackson *v.* Nimmo et al., art. 6, sec. 1, p. 409; Third Tenn. Chc'y. Rep., p. 477, and **49**, 475.

JUDGE'S CHARGE TO JURY.

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ART. 6, SEC. 9. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.[1] [Same as Const. 1834, art. 6, sec. 9.]

[Const. 1796, Art. 5, Sec. 5: "The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."]

On Question of Probable Cause—Province of Court and Jury in Determining—Law and Fact—English Doctrine.—The circuit judge charged the jury "that probable cause was composed partly of law and partly of fact, and the court says to the jury if they believe the testimony of the witnesses, there was, in the opinion of the court, no probable cause." This was assigned as error. WHYTE, J.: "It is contended for the plaintiff in error that there is a great difference between the law as held in England and the law as held in this State, by virtue of the provisions of our Constitution on the subject—that in England the judge decides what is probable cause, but here it is the province of the jury under the influence of the Constitution, and that this charge of the court infringes on their rights in this respect in the present case. A difference is supposed by the argument to exist as to the mode of trial of 'probable cause' in the action of malicious prosecution between the law in England and the law in this State. The difference is predicated upon the fifth section of the fifth article of our Constitution, which says: 'Courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.' But upon examination it will be found rather a seeming difference than a real difference. It will not do to say upon this instrument (the Constitution), as is sometimes broadly said, that probable cause is matter of fact, depends upon the testimony, that the jury are the constitutional judges, or triers of the fact, and therefore the judges of what is probable cause or not probable cause. The Constitution does not warrant this conclusion, that because they are the triers, or the judges of the facts, that therefore they are the judges of probable cause; for probable cause is the conclusion or result of law

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[1] For indirect or unimportant references to this section, see **3**, 500; **5**, 167; **21**, 283; **22**, 466; **24**, 479; **36**, 593; **37**, 389; **70**, 596; **74**, 211; **78**, 679.

upon the facts, and to use the expressions in the books, the jurors can not respond to the law, nor can the judges respond to the facts. Probable cause, then, in malicious prosecution, being a combined operation of fact and law, necessarily requires the intervention of both the jury and the judge to arrive at the result or conclusion of whether probable cause or not. . . .

"The jury decide upon existence of the facts, the judge decides upon their operation in law. Thus when the evidence is closed, the judge declares to the jury that if they believe the testimony, or facts given in evidence to be true, the law arising on that testimony is, or the testimony amounts to, probable cause, or not probable cause. And this mode is strictly agreeable to our Constitution above stated. It says the courts shall not charge juries with respect to matters of fact; that is, the courts shall not say that this or that fact is proved or not proved, or that such testimony is to be believed or not believed. Not that the court shall not charge the law upon the facts or testimony, for the next following expression, that they (to wit, the courts) may state the testimony and declare the law, is explicit as to the meaning of the former. It is true that it has been advanced by some very able and learned judges, in former times, that on all personal issues the juries are judges of the law as well as of the fact, and in this capacity they may act upon the matter before them, and find the issue accordingly. . . . But the law at this day is certainly held the other way, pursuant to the common law doctrine, *ad questionem legis respondent predices, ad questionem facti respondent juratores*, and our Constitution is in accordance with this maxim in the place above cited. That the jury are the triers or judges of the fact, and the court the declarers or judges of the law upon the fact, is not now to be disputed. . . .

"Now, what part of this charge is wrong? Where is the error? We have seen from the books that probable cause is composed of law and fact. In the case of Kelton *v.* Blevins, cited by plaintiff in error, the doctrine is thus laid down: 'Our Constitution hinders the judges from charging the jury as to matters of fact; whenever, therefore, an action of this kind is commenced, and a plea of not guilty pleaded, the jury are to try the question of probable cause, and it is a question then compounded of law and fact. The jury are to decide it as other questions under the direction of the court as to the law. They judge of the facts for themselves, and receive the law from the court. What language can be more plain than this? It seems to me no comment by way of explanation can add to its clearness." **10**, 332. *Williams v. Norwood.* 1829.

"State the Testimony and Declare the Law"—Meaning of—Law Applicable to the Case on Trial Only.—GREEN, J.: "The principal ground relied on by the counsel for the plaintiff in error is, that the judge who

tried the cause, in his charge to the jury, assumed the right to decide the facts of the case, and excluded from the jury the free exercise of their constitutional powers. In the part of the charge complained of, the judge in substance told the jury that the principle of law read and relied upon by defendant's counsel, that if a stranger, seeing two fighting, helps one and kills the other, it is manslaughter, could have no application to a case like this. It is insisted that he here assumed the state of facts presented by the evidence in this cause, and excluded the jury from an investigation of the facts, so as to ascertain whether they brought this case within the principle contended for. The judge may 'state the evidence, and charge the law.' This means that he is to charge the law arising upon the evidence so stated by him. He is not to charge every principle of law which may be insisted upon by counsel, whether it have application to the case under consideration or not, how sound soever such principle may be in the abstract. If he were, he would be guilty of gross impropriety. Such a course would tend to the subversion rather than the attainment of justice. It is as important that irrelevant questions of law should be kept out of the view of the jury as that they should not be permitted to hear irrelevant facts. In either case, to incumber their minds with a mass of irrelevant matter would tend to obscure the true matter of inquiry, and lead them astray in the investigation of questions not before them. If a principle of law be stated and insisted on by counsel, which manifestly has no application to the case, it is the duty of the court to tell the jury it has no application, lest they be misled by it. It is a great mistake to suppose that a court, in charging the jury, is to deal altogether in abstractions. His discussion of legal questions should be confined to such only as are directly raised by the evidence in the cause. From what has been said, it follows that if the principle stated and insisted on by the defendant's counsel has no application to this case, the judge did not err in telling the jury so." **12**, 142. [1]*Conner v. The State.* 1833.

In Case of Homicide—Judge Must Leave Jury to Draw Conclusions from Testimony and Law as Stated by Him.—REESE, J.: "The bill of exceptions states that, among other things not objected to, the court charged the jury 'that a slight assault would not of itself justify a homicide—as, if a man should slightly pull another's cravat, which would in law be an assault, and the party so assaulted should get a bowie knife and kill the other, this would not of itself present a case of homicide in self-defense; and, further, that, if the jury should return a special verdict in this case, presenting as the facts in the case the testimony of James Jones, excluding the testimony of Robert Harrison, and taking as true the testimony of all the other witnesses, the court could not, upon such a special verdict, say

[1] Reaffirmed, see **69**, 270.

the prisoner has made out a case of self-defense; that the jury had a right to return a general verdict, and the prisoner had a right to require it at their hands. The prisoner was found guilty of manslaughter, and presents his appeal in error to this court, and his counsel contends here that the charge of his honor, the circuit judge, is inconsistent with" (this provision.) . . . "If this assumption of the prisoner's counsel be well founded, the judgment is, of course, erroneous; for the juries are the exclusive judges of the credit of witnesses, of the weight of the testimony, and the truth of contested statements. 'Judges shall not charge juries with respect to matters of fact;' that is, they shall not decide upon the credit of witnesses, they shall not state in which scale there is preponderance of testimony, nor shall they inform them what conclusions of fact, from the proof heard, they ought to draw. But, 'they may state the testimony, and declare the law' thereon—that is, in the case before us, the judge may say, 'the witness, Jones, has said so and so, or, you have heard and remember the facts stated by him; if you believe all those facts to be true, the law thereon is that they do not make out a case of homicide *sese defendendo*. The facts being found or admitted, what shall constitute homicide excusable, or manslaughter, is a conclusion of law, and not of fact. The case put by us is that which really occurred. What is said by the Circuit court on the subject of a special verdict is not so strong and so direct against the prisoner as if he had said that the law arising upon the statements of Jones, taking them all to be true, was that the homicide committed was not excused by the assault proved. Perhaps declarations of law, as arising upon the facts, are seldom made in the manner, or with the force, presented in the case before us. But, be this as it may, we cannot say that the honorable judge violated the constitutional rule, or transcended the limits of his official and appropriate duty.

"We have been referred, by the prisoner's counsel, to a case determined by this court, at this place, at the December term, 1837, Johnson and wife, in error *v.* The State (MS.) In that case the question for the jury to determine was, whether the correction of a child, by the defendant, so far exceeded the reasonable limits of parental duty and authority as to amount to a trespass and breach of the peace. A majority of the court who determined that case were of opinion that this was a conclusion of fact, to be drawn by the jury from all the proof and circumstances of the case. But the circuit judge, in substance and effect, charged the jury that, if they believed the witnesses, 'the conduct of the defendants was cruel and barbarous in the extreme,' and of course that they should be found guilty. This court thought such a charge was trenching upon the province of the jury as to matters of fact, and reversed the judgment. The ground upon which that decision was placed presents no obstacle to the conclusion we have arrived at in the present case." **21**, 183. *Claxton v. The State.* 1840.

Objects of this Provision — Evils Intended to be Remedied — "Shall Not" and "May State" — Meaning of. — TURLEY, J.: "This provision arose out of the jealousy with which our ancestors always looked upon any attempt on the part of the courts to interfere with the peculiar province of the jury, the right to determine what facts are proved in a cause, and to put a stop to the practice of summing up, as it was and is yet practiced in the courts of Great Britain, and in all probability in the Colonies before the Revolution, and which consists in telling the jury, not what was deposed to, but what was proved. . . . This the framers of our Constitution considered a dangerous infraction of the trial by jury, and have prohibited it by express terms. "Judges shall not charge with respect to matters of fact,' that is, shall not state to the jury what facts are proved; to do so is error, for which a case must always be reversed. But not being disposed to withhold from the jury any proper aid which the judges may be enabled to render them in their investigation, they have provided that they may state the testimony — that is, may, for the purpose of refreshing the memory of the jury, inform them what facts the different witnesses have deposed to, leaving them to judge of the truth thereof, and to draw their deductions therefrom. It will be observed that the prohibition is direct and positive, 'shall not;' the power permissive, 'may state.' The use of the words 'shall' and 'may' in this juxtaposition can not be supposed to have been accidental; if the intention had been to make an exercise of the power granted as positive as the prohibition, the word 'shall' would have been used in both instances, viz.: 'Shall not charge with respect to matters of fact, but *shall* state the testimony and declare the law.' The use of the word 'may,' then, can not in this clause be considered as synonymous with the word 'shall,' but leaves it discretionary with the court to state the testimony or not, according to the exigency of the case. If the testimony be of a complicated character, difficult of recollection and comprehension, and there be a controversy between the parties litigant as to what facts are deposed to, it will be the duty of the court either to state the testimony or to recall the witness upon the controverted points for explanation; but, when there is no dispute relative to the facts deposed to, and the testimony is not complicated or difficult of recollection, the court, in its discretion, may decline exercising the power given it without committing error. This is a legal discretion, and the refusal to exercise it is not error, unless it can be shown that injury did or might necessarily be supposed to have arisen from this refusal. But it is argued that the word 'may' is applicable to both the powers given to the judges by this clause of the Constitution, viz.: 'may state the testimony' and 'may declare the law;' and it is assumed that a refusal to charge the law is, *ipso facto*, error, and, therefore, a refusal to state the testimony is also, *ipso facto*, error. We do not think the

premises upon which this argument rests are correct, that a refusal to charge the law is of necessity, in all cases, cause for a reversal; for if there be no disputed principle of law, the court need not charge upon the law. So, as to the testimony, if there is no dispute as to what is deposed to, the court need not state the proof, and this because no injury can arise from not exercising the power." **23**, 155. *Ivey v. Hodges.* 1843.

Duty of Court—Slight Departure From.—GREEN, J., held: "Strictly, the duties of the court, as defined by the Constitution, should be performed by stating the evidence and telling the jury what the law would be if the facts thus stated to be evidence were proved to their satisfaction; but the departure of the judge from the strict line of his duty is very slight, and could not have misled the jury, where it consists in the assumption of facts as proved, about which there was no controversy, and which were most plainly proved as he stated them, and is not sufficient to require a reversal." **24**, 502. *Farquhar v. Toney.* 1844.

With Reference to Change of County Line—Judicial Knowledge.—The plaintiff in error was indicted in the Coffee county Circuit court for larceny, convicted and sentenced. Appealed. "During the trial the defendant read to the jury an act passed the 30th of January, 1846, entitled 'An Act to attach a portion of the county of Coffee to the county of Grundy,' and the State introduced witnesses to prove that the line described in that act would run within less than twelve miles of the seat of justice of Coffee county. The court told the jury that if the line described in said act runs within less than twelve miles of the seat of justice of Coffee county it is unconstitutional and void."

GREEN, J.: "It is insisted that his honor erred in telling the jury they could disregard the Act of the 30th of January, 1846, attaching a part of Coffee county to Grundy county, if, from the proof, they should believe the line therein described was within less than twelve miles of the seat of justice of Coffee county.

"Perhaps his honor, in this collateral way, should not have decided upon the constitutionality of this act. But we judicially know that this act of assembly came directly under review in this court at its last term in the case of Gotcher *et al. v.* Burrows *et al.*, when it was determined that the said law was in violation of art. 10, sec. 4, of the Constitution, which provides that 'no line of such county shall approach the court house of any old county from which it may be taken nearer than twelve miles.' . . . This decision had been made previously to the trial in the Circuit court of the cause now before us, and it was competent for the circuit judge, judicially, to know of the existence of this decision of this court, and, without any proof upon the subject, to have stated to the jury that the Act of the 30th of January, 1846, read to them by

the defendant, was unconstitutional and void, and could not be looked to by them as proof that the offense charged in the indictment had been committed in Grundy county. There can, therefore, be no ground to reverse this judgment on this point, if it were conceded that his honor erred as to the mode of arriving at the conclusion to which the exercise of his judicial knowledge would have brought him." 29, 115. *Cash v. The State.* 1849.

That Certain Acts Would be Grounds for Reasonable Apprehension of Danger—Province of Judge and Jury.—SHIELDS, Sp. J.: "The proposition of fact to be maintained and established by the plaintiff below, was, that the defendant there had done such acts as would naturally produce and cause the injury complained of. It was a question of fact, to be determined by the jury; yet the court there informed the jury that certain specific facts would amount to proof of the issue on the part of the plaintiff. Independent of the prohibition in the Constitution, we should condemn this instruction; for it is an ancient rule, that whether there be any evidence or not, is a question for the judge; whether it is sufficient evidence, is a question for the jury. The judge may decide what is evidence, but it is for the jury to say what is proof. But when the judge told the jury that certain acts would be grounds for a reasonable apprehension of danger, and that the party thus pursued might abandon his home, and hold him thus pursuing liable in damages, he clearly charged the jury with respect to the matters of fact. It was for the jury, and not the judge, to say what would be such reasonable grounds of apprehension as would induce a man of ordinary firmness and discretion to so abandon his home as to entitle him to maintain an action against the party whose wrongful and unauthorized acts induced that apprehension. It is well known to those of us who have had experience in investigating questions of fact before juries, that very slight intimations from the bench have a commanding influence over the jury; and judges presiding at such trials should sedulously avoid an expression of opinion, further than to declare the law; otherwise the trial by jury, so highly valued by the English and American people, will become but an empty and ridiculous form." 48, 77. *Ellis v. Spurgin.* 1870.

In Murder Trial—Refusal to Charge Law as to Manslaughter.—MCFARLAND, J., held: "In trials for murder the refusal to instruct the jury upon the law of manslaughter is erroneous, because it discloses the opinion of the judge upon a material question of fact, and is hence an invasion of the province of the jury." 65, 491. *Little v. The State.* 1873.

As to Weight of Evidence or Conclusions.—COOPER, J.: "This court has invariably held that judges are forbidden to instruct the jury upon

the weight of evidence or as to the conclusions to which it must bring their minds." **82**, 157. *Jones & Son v. Cherokee Iron Co.* 1884.

Court Can Not Direct Jury to Return a Particular Verdict.—CALDWELL, J., held: "For the court to direct the jury to return a verdict in favor of either party, where there is any conflict in the evidence, is an invasion of the province of the jury by the court, for which the case will be reversed." **90**, 638. *Cantrell v. K. C. G. and L. & N. R. R. Co.* 1891.

As to What is Shown by Certain Enumerated Facts.—CALDWELL, J., held: "The court erroneously invades the province of the jury by stating to them, in his charge in a criminal case, that certain enumerated facts shown in proof 'strongly indicate' the defendant's guilt." **93**, 216. *Boyer v. The State.* 1893.

POWER TO ISSUE WRIT OF CERTIORARI.

ART. 6, SEC. 10. The judges or justices of inferior courts of law and equity shall have power in civil cases to issue writs of *certiorari* to remove any cause, or the transcript of the record thereof, from any inferior jurisdiction into such court of law on sufficient cause, supported by oath or affirmation. [Same as Const. 1834, art. 6, sec. 10; Const. 1796, art. 5, sec. 7.]

[Cont. 1834, Art. 6, Sec. 10: "Judges or justices of the inferior courts of law, as the legislature may establish, may have power in all civil cases to issue writs of *certiorari* to remove any cause, or the transcript of the record thereof, from any inferior jurisdiction into said court on sufficient cause, supported by oath or affirmation."]

[Const. 1796, Art. 5, Sec. 6: "The judges of the superior courts shall have power in all civil cases to issue writs of *certiorari* to remove any cause, or a transcript thereof, from any inferior jurisdiction into their court on sufficient cause, supported by oath or affirmation."]

[Const. 1796, Art. 5, Sec. 7: "The judges or justices of the inferior courts of law shall have power in all civil cases to issue writs of *certiorari* to remove any cause, or a transcript thereof, from any inferior jurisdiction into their court on sufficient cause, supported by oath or affirmation."]

Certiorari in Tennessee and North Carolina—Reasons for This Section.—WHYTE, J.: "It hath been argued, in order to show that the decision at Carthage ought to be extended, that this writ by our law is a constitutional writ, given in civil cases by express words, both to superior and inferior courts, for the removal of causes from inferior jurisdictions upon sufficient cause, supported by oath or affirmation, Constitution, art. 5, secs. 6 and 7, to which no limitation of time is annexed, that it therefore, it is argued, deserves consideration, and is a matter of delicacy to say that the court will impose a limitation, when the Constitution hath not thought proper to do so. To this it is answered, that at the time of the adoption of our Constitution the State of North Carolina, of which we had previously formed a part, had not so sufficiently and firmly established its *certiorari* practice as not to have it disputed; it was opposed a long time in that State by the ablest counsel, and even then continued to be so opposed. The *certiorari* seemed to the framers of our Consti-

tution a matter of too much consequence to the interests of society to hazard its establishment, as in North Carolina, with the courts, assailed as it was; and they therefore at once secured its existence and the outlines of its use by constitutional provision, thereby settling the question agitated in North Carolina, as far as it regarded this State. But it seems to me the Constitution regarded nothing further than what was expressed, leaving the particular application of it to the discretion of the courts of the State, upon questions as they should arise, in their different bearings upon society. It is believed the construction of the Constitution, as contended for by the defendant in error, would not comport with the views of its framers. To extend the limits of its application indefinitely would be productive of the greatest evils to society. To extend it further than the case at Carthage has done is considered unsafe, and might hazard the repose and quiet of the country. We, in the spirit of the framers of the Constitution, are friendly to the *certiorari*, and therefore wish to support it, but we consider this to be best effected by not enlarging the field of its operation, but by confining it within its present bounds." 5, 145. *Perkins v. Hadley.* 1817.

Certiorari Granted by Two Justices.—GREEN, J.: "By the [1]Act of 1833, ch. 65, sec. 2, two justices of the peace are empowered to grant a *certiorari* to remove proceedings from before justices of the peace into the Circuit court. It is said this act is unconstitutional, and the Circuit court so considered. The court is of opinion that the power secured to the judges of the superior courts by the Constitution, in art. 5, sec. 6, and to the judges and justices of the inferior courts in the seventh section of the same article, was only intended to restrain the legislature from abridging the right of the citizen to this remedy, and not to exclude all power of legislation upon the subject. Hence, many acts have been passed by the legislature in furtherance of the intention of the framers of the constitution in this particular. By the Act of 1801, ch. 7, sec. 4, it is enacted that an application for *certiorari* to remove the proceedings from justice of the peace to the County court, must be made to two justices of the peace within twenty days after the rendition of the judgment. Many other acts regulating this subject have been passed, none of which being an abridgment of the power conferred in the sixth and seventh sections of the fifth article of the Constitution have been regarded as in violation of that instrument. Although the sixth section, before referred to, confers on the judges of the superior courts power to grant a *certiorari* to remove the transcript of a civil cause from any inferior court of record to the superior court, yet it says nothing about a criminal cause, or the removal of causes from before justices of the peace. But by the Act of 1829, ch. 16, sec. 2, the power was conferred on the circuit

[1] Code 1858, 3127; T. & S. 3127; M. & V. 3843.

judges to remove causes into their courts from before justices of the peace; and this they had been in the constant practice of doing before the passage of that act, and also of granting this writ for the removal into their courts of criminal causes from military tribunals, in the exercise of a power analogous to that of the court of king's bench in England. If the assumption in this case, that the Constitution having conferred certain powers, the exercise of all other powers upon that subject is excluded, then this practice of the courts and these acts of the legislature were all unauthorized. But they have never been so considered, and, manifestly, instead of being infractions of the Constitution, are in furtherance of the intention of its framers. The Act of 1833, ch. 65, is not, therefore, unconstitutional." **15**, 22. *Duggan v. McKinney.* 1834.

Limits of Remedy by Writ of Certiorari.—McHENRY, Sp. J.: "The power of the legislature, under the Constitution, to regulate the remedy by writ of *certiorari*, so as not to abridge the rights of the citizen, can not be successfully questioned. Duggan *v.* McKinney. Assuming this power, the legislature, in Code, [1]sec. 3123, has proceeded to prescribe what shall be the limits and conditions of the remedy by writ of *certiorari*, in general terms. It is certain there is no specific legislation regulating the remedy in question, as applicable to the precise facts detailed as aforesaid. The case must, therefore, if this remedy be allowable, fall within the scope of sec. 3123. The section of the Constitution quoted requires that the removal shall be of a 'cause or the transcript of the record.' It shall be from an 'inferior jurisdiction.' It shall be 'on sufficient cause.' The legislature, in the exercise of its power to regulate the writ, has provided that the inferior tribunal shall be such, or the board, or the officers, as is invested with judicial functions. To sum up, under the Constitution and the law, before the writs of *certiorari* can be invoked or awarded, there must be a 'cause,' the inferior jurisdiction, whether a tribunal, board, or officer, must have exercised judicial functions; and sufficient cause must be shown for the removal. And under sec. 3123, of the Code, other facts must exist to authorize the remedy in question. The inferior tribunal must have exercised its jurisdiction, or must be acting illegally, and further, in the judgment of the court, or officer granting the writ, it must appear 'there is no other plain, speedy or adequate remedy.' These observations are confined specially and exclusively to the sections of the Constitution and Code above copied." **62**, 269. [2]*Bouldin v. Lockhart.* 1873.

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[1] M. & V., 3838.

[2] See same case, art. 10, sec. 4.

INCOMPETENCY OF JUDGES.

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ART. 6, SEC. 11. No judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior court, except by consent of all the parties. In case all or any of the judges of the Supreme court shall be thus disqualified from presiding on the trial of any cause or causes, the court, or the judges thereof, shall certify the same to the governor of the State, and he shall forthwith specially commission the requisite number of men of law knowledge for the trial and determination thereof. [Same as Const. 1834, art. 6, sec. 11.] The legislature may, by general laws, make provision that special judges may be appointed to hold any court the judge of which shall be unable or fail to attend or sit, or to hear any cause in which the judge may be incompetent.[1]

[Concluding clause of Const. 1834, Art. 6, Sec. 11: "In case of sickness of any of the judges of the Supreme or inferior courts so that they or any of them are unable to attend, the legislature shall be authorized to make provision by the general laws that special judges may be appointed to attend said courts."]

[Const. 1796, Art. 5, Sec. 8. "No judge shall sit on the trial of any cause when the parties shall be connected with him by [3]affinity or consanguinity, except by consent of the parties. In case all the judges of the superior courts shall be interested in the event of any other cause or related to all or either of the parties, the governor of the State shall in such case specially commission three men of law knowledge for the determination thereof."]

Judge—Incompetency—Relationship.—COOPER, J., held in this case that a judge is not incompetent, under the Constitution and laws[2] of this State, to sit in a cause in which the husband of his wife's sister is a party. In this opinion Judge COOPER reviewed the case of Waterhouse *v.* Martin, and said: "In practice, the precedent set by Judge Whyte in Waterhouse *v.* Martin has usually been followed by this court. The judge, whose competency has been called in question, has been allowed

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[1] See State *v.* Solomons, art. 1, sec. 10, p. 93; also 3, 477; 5, 72; 7, 129; 16, 499; 32, 178; 59, 33; 88, 13.

[2] T. & S., 4098; M. & V., 4873.

[3] In the case of Waterhouse *v.* Martin, 7, 379, decided in 1824, WHYTE, HAYWOOD, and PECK were the judges. WHYTE being married to the sister of Martin's mother, and Thomas Haywood, son of Judge HAYWOOD, to her sister, the question was made by counsel on both sides whether either of these judges were competent to sit in the case. Judge WHYTE was admitted to be connected with Martin by affinity. The counsel for Martin insisted that Judge HAYWOOD, also, was connected with Martin by affinity. Judge WHYTE declined to give an opinion on this point, claiming that it should be decided by Judge HAYWOOD alone. Judge HAYWOOD, after reviewing the question, said: "If this view of the case be correct, here is such a degree of nearness as, according to the spirit of our Constitution, disqualifies the judge to whom the exception applies. But we will keep this point under consideration a few days, and will look into authorities, and mention the subject again." Finally an opinion was obtained from Judge WHYTE. The following day, after hearing further argument, he delivered an "addition" to his opinion, in which he

to decide for himself the question of his competency, the parties to the cause acquiescing in his action. As a result, a judge has sometimes declined to sit from motives of delicacy, when not in fact incompetent by law. Whether as a court we would not consider ourselves bound by the decision in Waterhouse *v.* Martin, if the point were squarely raised by the parties, we need not stop to inquire." **78**, 5. *Hume et al. v. Commercial National Bank et al.* 1882.

Justices of the Peace—Relation to Parties Litigant—Judgment Not Void—When—Certiorari.—COOPER, J., held: "A judgment rendered by a justice of the peace who is related to one of the parties within the prohibited degree,[1] without objection made by the judgment debtor on that ground, is not void, but voidable only; and therefore a *certiorari* for that cause will not lie to quash an execution issued on the judgment." This decision overruled the opinion in Reams *v.* Kearns, **45**, 217; Mathes *v.* The State, **50**, 127; and Smith *v.* Pearce, **65**, 72. In reviewing these cases Judge COOPER said: "If it be that a judgment is absolutely void which has been rendered by an incompetent judge, and that any party may have it so declared at any time afterwards upon proof of the fact, it would present an anomaly in the law bearing upon judgments and decrees, and lead to some curious results. The statute, it will be remembered, prohibits a judge or justice from sitting when he is related to either of the parties, and if the judgment be void it will be void although rendered against the party to whom the judge is related, and so it was held in Smith *v.* Pearce, 6 Baxt., 72. That case is the more remarkable as the complainant had waived the incompetency of the judge, although not in writing, and was yet allowed to annul the judgment upon his own application to a court of equity, without assigning any other ground for relief. It is scarcely possible the constitutional convention or the legislature could have contemplated such a result. The Constitution and the statute were unquestionably intended to secure to parties litigant the right of trial by an impartial judge, but they do not provide that every judgment rendered by an incompetent judge shall be void. The Constitution and the statutes provide that every judge

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said that a judge "can not be disqualified by the opinion of others; it is his duty to sit by his own judgment alone, upon his own responsibility. It never would do, on the one hand, for a judge to shrink from his duty, and shelter himself under the opinion of a majority, allowing his disqualification, or, on the other hand, to be driven from the discharge of his duty by the opinion of a like majority, denouncing him disqualified." At a subsequent day of the term, when the case was about to be called, Judge HAYWOOD, for himself and Judge PECK, delivered the final opinion, in which they held: "The judges are bound to interpret the Constitution in all its parts, and, therefore, to determine whether, under the provision of art. 5, sec. 8, of the Constitution of 1796, one of its members was disqualified to sit in a particular cause, by reason of his connection, by affinity or consanguinity, with one of the parties; it is not a question for the judge to determine for himself. And a judge who is confessedly disqualified by such connection to sit in the cause, may yet determine the question of the disqualification of a brother judge. There is no connection by affinity between a party to the suit and the judge whose son's wife is aunt of such party." As a result of this decision, the Constitution of 1834 was amended, fixing the affinity "within such degree as may be prescribed by law," and a law was afterward passed to obviate the difficulties experienced in the above case in determining what was meant by the word "affinity." Code 1858. 3913, 4098; T. & S., 3913; M. & V., 4671.

[1] T. & S., 4098; M. & V., 4873.

shall be of a certain age, but the acts of a judge under the prescribed age would be valid, not void. Blackburn *v.* The State, 3 Head, 690. And so of the acts of a judge whose title might be successfully contested. Turney *v.* Dibrell, 3 Baxt., 235. These decisions, it is true, are rested upon a principle not applicable to the acts of a judge incompetent from relationship to one of the parties. They show, however, that a constitutional and statutory prohibition do not, necessarily, render judicial acts void." 76, 759. *Holmes v. Eason.* 1882.

Special Judge—Election by the Bar.—The constitutionality of the [1]Act of 1870, ch. 78, sec. 1, sess. A., p. 125, authorizing an election of a special judge of inferior courts of record to preside in case of the incompetency or absence of the regular judge was considered. FREEMAN, J.: "It will be seen that in case of the judges of the Supreme court the Constitution itself provides for the governor's commissioning men to try and determine the cases in which they are incompetent. But in case of a judge of an inferior court the legislature is left to make provision that special judges may be appointed to hold any court. It is not a provision for filling a vacancy, but goes upon the assumption that the office itself is filled by the regular incumbent, who fails to attend and sit, or is incompetent to try any cause on the docket. After looking carefully into the various provisions of the Constitution bearing on the question, we conclude that the Constitution did not intend to authorize the filling of an office, but only to allow the legislature to provide for the temporary appointment of some one to 'hold any court' when the judge failed to attend and sit, or was incompetent; and that the mode of such appointment is within the discretion of the legislature. We can see no objection to making this appointment by the members of the bar. It no more contravenes the 'principle' of universal suffrage and election of all officers by the people, as insisted by counsel, than would an act of the legislature which should provide for the appointment of a person to hold the court, by the governor. The members of the bar are interested in selecting the best man for the place, and certainly are better qualified to judge of the fitness of the party who may be selected by them than the governor of the State, who may know nothing on the subject." 50, 163. [2]*Ligan v. The State.* 1871.

Special Judge of Inferior Court—This Provision for Temporary Absence of Regular Judge—Not to Fill Vacancies.—FREEMAN, J.: "It will be seen that in case of disqualification of judge of the Supreme court, the governor is to specially commission some one to try the case in which he is disqualified. But in reference to the inferior courts, the providing for such incompetency or disqualification is left entirely to

[1] T. & S., 3930*a*; M. & V., 4695 et seq.

[2] See same case, art. 1, sec. 16, p. 111.

the legislature, and all that is required is that it shall be by 'general laws.' It is true the word 'appointment' is used, but we think this only means the selection or designation of some one to hold the court or hear any case in which the judge is incompetent. The provision is not to enable the legislature to provide for filling a vacancy in an office, but only to supply a temporary absence of the judge of the court, or in case he is disqualified to try any case, to enable the legislature to meet the exigency by enacting a general law to meet all such cases. The Constitution goes on the assumption that the office of judge is filled, but the officer is absent or incompetent to sit, and to meet such cases the legislature is left to its discretion to provide for them. We think the legislature have done so, and see no objection to the mode which they have prescribed. On the contrary, we can see no better mode of meeting the exigency than the one provided by the statute, and as we can not see that it conflicts with the Constitution, but as we think accords with it, we hold the act to be the law of the land." **52**, 706. [1]*Hundhausen v. Insurance Co.* 1871.

Selection of Special Judge by Members of the Bar Present.—DEADERICK, J.: "The Act of 1870, Code, sec. 3930*a*,[2] was passed in pursuance of the power conferred upon the legislature by the above cited section of the Constitution, and confers the power of appointment upon the attorneys of the court present, prescribing the qualifications of the appointee, and the mode of his selection. We are unable to see any reason why the legislature might not confer this power of appointment upon the members of the bar present at the court. They are quite as competent to make a judicious selection as any other depository of the power that we can imagine. Upon the score of convenience to suitors and to the bar, the arrangement seems to be an eligible one. The Constitution confers the power on the legislature 'to make provision that special judges may be appointed to hear any cause in which the judge may be incompetent,' without any limitation or restriction as to the mode in which the discretion conferred should be exercised, and we can see nothing in the act inconsistent with any provision of the Constitution." **66**, 320. *Halliburton v. Brooks.* 1874.

Special Judges Incompetent to Try Cases When Selected by Consent of All Parties.—TURNEY, J.: "The regular judge, N. W. McConnell, being incompetent to try this cause, by reason of his being counsel in the cause, it was agreed by both the counsel for the State and the prisoner, and the prisoner himself, that S. F. Wilson, a member of the bar, shall preside as special judge in the trial of this cause; thereupon N. W. McConnell retired from the bench and S. F. Wilson took the bench. Was this proceeding regular and according to the laws of the State?

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[1] See same case, art. 6, sec. 2, p. 420; T. & S., 3930*a*; M. & V., 4695. [2] M. & V., 4695.

We think not. There is no provision of the Constitution nor act of the legislature authorizing or directing the constitution of a court, or the supply of a vacancy for incompetency or other cause by the mode pursued in this case. This was not an inferior court created by the legislature, nor was it an election by the attorneys of the court, as allowed by ch. 78, sec. 1, of the [1]Act of 1870. In the appointment or selection of special judges in criminal cases, the law authorizing it must be strictly pursued and observed. As already stated, there was no authority under the Constitution or by statute for the proceedings in this case. The result is, the entire proceedings, verdicts and judgments, are nullities, leaving the case as if no trial whatever had been had. The prisoner was never in jeopardy, and is remanded for trial *de novo*." 68, 485. *Glasgow v. The State.* 1877.

Special Judge in Criminal Cases "By Consent of Parties" Not Allowed.—COOPER, J.: "The criminal laws of the State can only be executed by the tribunals and judicial officers of the State constitutionally and legally vested with the necessary authority. A person charged with crime ought neither to be required nor permitted to select a judge to try his case. And even if the legislature might constitutionally authorize a departure from the rule, there is no statute sanctioning the proceeding. The [2]Code, sec. 3921, limits the right of the parties to select a judge by consent to civil cases. The proceedings, as this court has heretofore held in a felony case, are void, and the defendant never having been in jeopardy, the case must be remanded for trial." 70, 675. *Neil v. The State.* 1879.

Special Judges—Salary.—DEADERICK, J., held: "The [3]Act of 1877, ch. 135, which provides 'that hereafter, when by reason of the incompetency, sickness, or other cause, any judge or chancellor of an inferior court shall be unable to hold his court, and a special judge shall be appointed or elected, said special judge shall receive no compensation from the State, unless in the recommendation or certificate of the regular judge or chancellor for the appointment of such special judge or chancellor he shall expressly authorize the said special judge or chancellor to be paid out of his regular salary,' is constitutional. In delivering the opinion he said: "It is only by virtue of the law that a salary can be claimed for official services. The legislature may refuse, as they have done in this case, to give any pay out of the State treasury to special judges, unless the regular judge agrees that it may be taken out of his salary. This he may do, or may not do. But unless he voluntarily relinquishes a part of his salary, he is entitled to it all. But if he chooses to release a part, we see no reason why he may not do it. The legislature, undoubtedly, might make provision for the payment of

[1] M. & V., 4682 et seq. [2] T. & S., 3921; M. & V., 1682. [3] M. & V., 4693.

special judges. But we think they have the undoubted power to refuse to do so if they think proper, and the comptroller can only issue his warrant for the payment of money where such payment is authorized by law." Judge TURNEY dissented. **83**, 430. *Pickard v. Henderson.* 1885.

Tax Assessor Not a Judge—Assessments—Assessors' Interest—Due Process of Law—U. S. Constitution, Art. 14, Sec. 1.—The act under consideration here was that of 1890 (ex. sess.), ch. 30, sec. 1. WILKES, J., held: "A tax assessment, or the statute authorizing it, is not void by reason of the fact that the compensation of the assessor is fixed in proportion to the amount of taxes assessed, collected and paid over. The tax assessor is not the judge of any court within the meaning of that provision of the State Constitution forbidding judges to preside in causes where they may be interested. The 'due process' clause of the Fourteenth Amendment of the Federal Constitution is not violated by such statute or assessment." **94**, 297. *Grundy County v. T. C., I. & R. R. Co.* 1895.

PROCESS AND INDICTMENTS.

ART. 6, SEC. 12. All writs and other process shall run in the name of the State of Tennessee, and bear test and be signed by the respective clerks. Indictments shall conclude: "Against the peace and dignity of the State." [1] [Same as Const. 1834, art. 6, sec. 12; Const. 1796, art. 5, sec. 9.]

To What Process This Section Applies—Distress Warrant.—MCKINNEY, J., held: "This requirement applies to all process, civil or criminal, issued by any court or tribunal established by law, having authority to issue process, also to process issued under a valid corporation ordinance, or by law. A distress warrant issued by the recorder of a municipal corporation to collect a privilege is a process in the legal sense and in the sense of the Constitution, and must be issued in the name of the State. If issued in the name of the municipal corporation it is void." **30**, 250. *Mayor etc. of Nashville v. Pearl.*[2] 1850.

Venire Facias Juratores Not Process.—SNEED, J., held: "A *venire facias juratores* is not process within the meaning of the Constitution, and may be issued and signed by the judge of a court who is authorized to appoint the jurors, and 'to cause them to be summoned.'" **50**, 338. *White v. The State.* 1872.

Attachments—Who May Issue—Test.—MCFARLAND, J.: "The argument of defendant's counsel is that the chancellor had no authority to issue the attachment, and for this position the twelfth section of the sixth

[1] **7**, 76; **32**, 334.

[2] Meigs' Digest, vol. 2, p. 937.

article of the Constitution is relied upon. . . . Section 3463[1] gives to chancellors and judges of Circuit, Criminal or special courts, justices of the peace, or clerks of the court to which the writ is returnable, power to grant the writ; but it is argued that the power to issue the writ does not, under this, coupled with the above provision of the Constitution, belong to the judges, but only to the clerks of the court to which the writ is returnable. We have not found any satisfactory judicial exposition of the character of the 'writs and process' embraced in the above clause of the Constitution. But, we find by the original Act of 1793, ch. 1, that the authority to issue writs of attachment was given alone to judges of the Circuit court and to justices of the peace, and the form is therein provided, showing that it was to be signed by the judge or justice. It was held by this court, in the case of Morris *v.* Davis, 4 Sneed, 452, that an attachment issued by a clerk of the Circuit court, in aid of an action of tort upon the fiat of a judge, was void. Although it was conceded, that under the Act of 1843 the ancillary attachment was given in a case of that character, it was held void upon the ground that the clerk had no authority to issue process of that character. It was said that the authority to issue this process was confined alone to judges and justices of the peace, and was never conferred upon clerks of the courts until the Act of 1851–2, ch. 265, sec. 11. Upon this authority, and the legislation and practice, we must hold that the above provision of the Constitution does not prevent the legislature from authorizing judges to issue writs of attachment. We will not, however, attempt to define to what writs or process the clause in question has reference." **65**, 286. *Lyle v. Longley.* 1873.

Process Not in Name of State.—CALDWELL, J., held: "A writ[2] or other process that does not run in the name of the State is void upon its face, and that 'an *ex parte* order by a criminal judge for the re-arrest and detention of a discharged workhouse convict is void, and affords no protection to the officer executing it, where it appears upon the face of the order that the arrest is to be made in disregard and contempt of the judgment of another court discharging the convict upon *habeas corpus.*" **92**, 520. *McLendon v. The State.* 1893.

Indictment — Contra Pacem. — SNEED, J.: "An indictment in this State that does not conclude, 'against the peace and dignity of the State,' is a nullity. It is a positive injunction of the Constitution itself, that such shall be the conclusion of every indictment. It is, therefore, a matter that can not be affected by legislation, and a defect that can not be ignored by the courts. An indictment without these words is not an accusation of crime, and not an indictment in the sense of the Constitution. No conviction upon such an indictment could be permitted to

[1] M. & V., 1202.

[2] T. & S., 3720, 3723; M. & V., 4170, 4173.

stand; and a prisoner can not waive his rights in this respect, as it is the imperative mandate of the Constitution that all crimes shall be prosecuted by presentment or indictment, and that all indictments shall conclude, 'against the peace and dignity of the State.' . . . The conclusion, 'against the peace and dignity of the State,' in the last count, relates to all other preceding counts." **50**, 220. *Rice v. The State.* 1871.

CLERKS OF COURTS.

ART. 6, SEC. 13. Judges of the Supreme court shall appoint their clerks, who shall hold their offices for six years. Chancellors shall appoint their clerks and masters, who shall hold their offices for six years. Clerks of the inferior courts holden in the respective counties or districts shall be elected by the qualified voters thereof for the term of four years. Any clerk may be removed from office for malfeasance, incompetency, or neglect of duty, in such manner as may be prescribed by law.[1] [Const. 1834, art. 6, sec. 13, after the word "chancellors" and before the word "shall," contained these words, "if courts of chancery shall be established." After the word "offices," in the second line, appeared the words, "for a period of." Otherwise, the same.]

[Const. 1796, Art. 5, Sec. 10: "Erch court shall appoint its own clerk, who may hold his office during good behavior."[2]]

Constitutional Term of Office—Election to Office Requires a Legislative Grant.—MCKINNEY, J.: "The question in this case is whether the plaintiff in error or the defendant is entitled to the office of clerk of the Circuit court of Hancock county. The act to establish said county was passed on the 7th day of January, 1844. By the seventh section of the act it is provided that the election of county officers for said county shall be on the same day and under the same rules and regulations as provided by law for the election of officers in the other counties in this State. And, by the twentieth section, it is further provided that if said county 'shall fail to organize against the first Saturday in March next, and consequently fail to elect necessary county officers, as prescribed in the seventh section of this act, they shall proceed to elect their county officers on the first Saturday in July next thereafter, under the same rules and regulations as now prescribed by law, and such officers, so elected, shall hold their offices until the regular time of electing county officers in this State, and no longer. There was no organization of said

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[1] See Northern *v.* Barnes, art. 6, sec. 2, p. 424.

[2] In the case of The State *v.* Turk, **8**, 287, decided in 1827, CRABB, J., held: "The general assembly have an unquestionable right to supply the mode of executing a power, or a duty devolved by the Constitution, in general terms, on any citizen or body of citizens, provided that mode do not come in conflict with any of the injunctions of the Constitution, and is consistent with all its principles. The Act of 1796, 3, therefore, prescribing the time and manner of electing a clerk of the County court, is constitutional; and an appointment by that court of a person to act as clerk *pro tem.*, until an election can be held in accordance with the requirements of the law, is good for the purpose intended, and does not clothe such person with the office of clerk, to be held under the tenure prescribed by the Constitution." See same case, art. 2, sec. 2, p. 244.

With reference to Const. 1796, art. 5, sec. 10, it was held by HAYWOOD, J., that this provision prevents the repeal of a grant once issued by the State, unless in the way pointed out by the law of the land. **5**, 213. Overton's Lessee *v.* Campbell. 1818. Meigs' Digest, vol. 2, p. 927.

county under the foregoing act, and at the ensuing session of the general assembly, viz., on the 29th of January, 1846, an amended act was passed authorizing the commissioners to procure a resurvey of said county, so as to avoid constitutional objections. The second section of said amended act provides 'that after the commissioners shall have made the resurvey of said county of Hancock, as provided for in the first section of this act, they shall then proceed to organize said county of Hancock, as required by the act which this is intended to amend.' It appears from the statement of facts agreed upon by the parties and set forth in the record, that said county was organized 'by the election of county officers on the 3d day of December, 1846, at which election Marshall Brewer was elected clerk of the Circuit court of Hancock county, and at the October term, 1847, of said court said Brewer was admitted to the office of clerk of said court;' and it is further agreed that at the election for county officers in said county, at the regular time of election, viz., on the 4th day of March, 1848, the defendant in error, William B. Davis, was lawfully elected by the people clerk of said court.

"At the May term, 1848, of said court the defendant in error produced to the court the certificate of his election, and moved to be admitted to qualify, and to be inducted into said office. This motion was opposed by the plaintiff in error, who claimed the right to hold said office for the term of four years from his election, and leave was granted him by the court to appear and defend his right thereto. On argument, the circuit judge held that the defendant in error was legally entitled to said office, and ordered that he should be qualified and admitted accordingly, to reverse which order an appeal in error is prosecuted in this court.

"We are of opinion, upon the foregoing state of facts, that the defendant in error was properly held entitled to be admitted to said office, but for a reason very different from that urged in argument in his behalf. It is unquestionably true that the election of Brewer to the said office, on the 3d of December, 1846, had such election been authorized by law, would have entitled him to hold office for the full term of four years from the time of his qualification, notwithstanding any restriction which the legislature may have attempted to impose limiting his continuance in office to a shorter period. . . . There is no authority to be found in the Constitution for an election for a shorter period. And, although the election may be fixed, as in this case, at a time different from that appointed by law for the election of county officers in the other counties of the State, or to fill a vacancy occasioned by the death, resignation or removal of the prior incumbent, still, in either case, the person elected will be entitled to hold his office for the full constitutional term. It is not competent for the legislature to shorten the term, and any enactment to that effect is void. Such is the

rule applicable to all elections under the Constitution, whether by the legislature or people. The argument that this rule will lead to confusion and want of uniformity in the time of holding the elections is of little force, for, as is said in the case of Powers *v.* Hurst, 2 Humph., 24, such uniformity is of no practical utility, and, were it otherwise, is not attainable. If, therefore, the case rested solely upon this ground, we should not hesitate to reverse the judgment of the Circuit court." **28**, 212. *Brewer v. Davis.* 1848.

FINES OF LESS THAN FIFTY DOLLARS.

ART. 6, SEC. 14. No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.[1] [Same as Const. 1834, art. 6, sec. 14; Const. 1796, art. 5, sec. 11.]

Fine of Over Fifty Dollars—Art. 1, Sec. 16.—BURTON, Sp. J.: "The remaining error insisted on is that the court in these cases violated a constitutional provision in imposing a fine of more than fifty dollars when the same had not been assessed by the jury. . . . The substance of this constitutional provision is enacted in sec.[2] 5237 of the Code. The above provisions are manifestly an amplification of the provision contained in sec. 16, art. 1, against the imposition of excessive fines. The English Bill of Rights particularly declared that excessive fines ought not to be imposed which had a retrospect, according to Sir Wm. Blackstone, to some unprecedented proceedings in the court of king's bench, in the reign of King James II. The history of this important provision renders it plain that it was aimed at the abuse of the unlimited power of courts in respect to fines, and was not intended as a limitation upon the power of legislation. It is very plain, too, as we think, that the provision in our own Constitution that a fine not exceeding fifty dollars can not be imposed unless assessed by a jury refers to cases where the court has a discretion in fixing the amount of the fine. It can have no application to the case in hand, where the legislature has peremptorily fixed the fine at five hundred dollars in every case. This court has repeatedly exercised the jurisdiction to declare an act of the legislature unconstitutional, but have also recognized the rule that deference to a co-ordinate branch of the government demanded that an act of the legislature should not be declared unconstitutional unless it was a plain and palpable violation of the fundamental law." Judge TURNEY dissented. **65**, 485. *France v. The State.* 1873.

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[1] See McGhee et al. *v.* The State, art. 2, sec. 17, p. 286: also **91**, 443. [2] M. & V., 6078.

JUSTICES AND CONSTABLES.

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ART. 6, SEC. 15. The different counties of this State shall be laid off, as the general assembly may direct, into districts of convenient size, so that the whole number in each county shall not be more than twenty-five, or four for every one hundred square miles. There shall be two justices of the peace and one constable elected in each district by the qualified voters therein, except districts including county towns, which shall elect three justices and two constables. The jurisdiction of said officers shall be co-extensive with the county. Justices of the peace shall be elected for the term of six and constables for the term of two years. Upon the removal of either of said officers from the district, in which he was elected, his office shall become vacant from the time of such removal. Justices of the peace shall be commissioned by the governor. The legislature shall have power to provide for the appointment of an additional number of the justices of the peace in incorporated towns.[1]
[Same as Const. 1834, art. 6, sec. 15.]

[Const. 1796, Art. 5, Sec. 12: "There shall be justices of the peace appointed for each county, not exceeding two for each captain's company, except for the company which includes the county town, which shall not exceed three, who shall hold their offices during good behavior."[2]]

Term of Justice — Election of Successor. — CARUTHERS, J., held: "So much of the fifteenth section of the Act of 1835, ch. 1, as limits the term of a justice elected to fill a vacancy to the remainder of that of his predecessor in office is unconstitutional and void. The term of office of justices of the peace is fixed by the Constitution, unalterably, at six years." **35**, 7. *Keyes v. Mason.* 1855.

Additional Justices for County Towns—Questions to be Determined By the Legislature Alone. — On February 3, 1858, the legislature passed an act amending the act incorporating Rheatown, Green county, so as to empower the citizens of that town to elect one justice of the peace and one constable, both of whom were required to live in the corporate limits, and giving them the right to exercise all the powers and privileges of other magistrates and constables in said county. The lower court held the act invalid. HORACE MAYNARD, Sp. J.: "It is maintained that this provision of the Constitution is mandatory to the legislature and not enjoining a duty restrictive in its character, and not limiting the power, the object being to secure to every neighborhood a domestic tribunal of justice, and to be understood as reading: 'There shall be at least two justices of the peace and one constable elected,' etc. This view is plausible, and we are not prepared to say it is incorrect. Such

[1] See Fields v. The State, art. 1, sec. 8, p. 29; **32**, 70. [2] See **9**, 195. [3] See **38**, 371.

we find to have been the opinion of several different legislatures, as appears from various acts conferring upon different municipal corporations privileges of the same character, and often identical with those conferred by the Statute under consideration upon the citizens of Rheatown. Nothing but a profound conviction would constrain us to pronounce null all such legislation and the acts done in pursuance thereof, had we the power.

"It is but repeating the language of the court to hold that there are many provisions of the Constitution, directory, mandatory and prohibitory to the legislature, against the violation of which there is and can be no legal protection. Such are the clauses requiring the performance of duties imposed upon the legislature itself, and the restriction in the performance of these duties. In all these and the like cases the only security is to be found in the obligation of the members to support the Constitution, and in the ballot box. A court of justice can not compel action; it can not prohibit action; it can not undo action. Should the legislature, for instance, establish a new county, in violation of the constitutional provisions upon that subject, organize courts and all the machinery for the administration of its local affairs, and provide for the appointment of justices, sheriff, constables and other county officers, the courts, both of equity and law, are powerless to interfere. Or, should the legislature, in violation of the clause in the Constitution just quoted, lay off a given county into more than twenty-five civil districts, or into districts containing less than twenty-five square miles, could the courts declare the acts of the supernumerary officials, thus created, to be illegal? Certainly not. Such action of the legislature would belong to the political and not to the judicial power of the government. So, likewise, the act now before us. The holding of the Circuit court, therefore, was erroneous." 42, 16. *Britton et al. v. Moody.* 1865.

Justices of the Peace—Term of Office—Election by Incorporated Towns—Repeal of Charter—Effects of—Art. 7, Sec. 5—Art. 5, Sec. 5.—FREEMAN, J.: "The question is, whether the repeal of the acts of incorporation of these towns removes the justices elected, according to the above clauses of our Constitution, and the statute providing for this, or do they still remain justices for the county for the full term of six years? It is settled by our decisions that the legislature had no power to abridge the term of office of the justices of the peace, under any circumstances, by an affirmative enactment, to a less period than the term provided by the Constitution, to wit, six years. 2 Humph., 24; 9 Humph., 208; 3 Sneed, p. 6. This is so obvious as to need no additional argument. The Constitution has fixed the term of office at six years. It is true a change was made, in one case only, by the Constitution of 1870, providing that 'no appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term.' Art.

7, sec. 5. But this only emphasizes the general rule by a well defined exception, which does not include the parties in the present case. . . . There are justices' courts or Circuit courts provided for by the Constitution, only an election or appointment of these officers, and the people designated who may elect them. In the case of an incorporated town, it is provided the inhabitants shall have the power to elect; when so elected, they are then justices of the peace of the county, not of that corporation, and have jurisdiction co-extensive with the county. The Constitution, then, in imperative terms, provides they shall be elected for six years, and they are so commissioned by the governor. They must so hold, unless some other provision of the Constitution, by fair and reasonable implication, forbids, under prescribed circumstances, or authorizes the legislature to remove from office in a shorter period.

"By art. 5, sec. 5, of the Constitution, provision is made for 'removal of justices of the peace and other civil officers, on conviction for crimes and misdemeanors in office, after indictment, and then by the judgment of the court, they are to be removed from office, as if found guilty on impeachment.' The logical result that follows from the repeal of the act of incorporation of a town, having the power, by virtue of its corporate existence, to elect a justice, is not that the justice that has been elected shall cease to be a justice of the county, but only that the town for the future shall not have the power of election. This is the legitimate result of such repeal and no more. If it had been intended that the repeal of the act of incorporation should deprive the justice of his office, it would have been easy, and the most natural thing, to have added a few words to the clause, authorizing the legislature to provide 'for the appointment of an additional number of justices of the peace in incorporated towns,' and simply to have said, 'who should only hold their offices while said town remained incorporate.'" 84, 487. *Cross v. Mercer.* 1886.

Additional Justices for Incorporated Towns—Act 1875, Ch. 8.—W. A. HENDERSON, Sp. J.: "It is undoubtedly competent for the legislature to confer, by special act, the power upon any incorporated town to elect a *definite number* of additional justices. . . . But an [1]act conferring upon an existing municipal corporation, or upon each of a class of such corporations, the power to elect 'two justices of the peace in each ward into which such city may be subdivided,' is not a constitutional exercise of the legislative power to provide for the appointment of additional justices in incorporated towns. Such act constitutes an illegal delegation of legislative power to incorporated towns." Judge LURTON dissented. 90, 722. *The State ex rel. v. The Nine Justices.* 1891.

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[1] M. & V., 393, amended by Acts 1891, ch. 58.

Justices of the Peace — Jurisdiction — Question Reserved. — BEARD, J., held: "A justice of the peace, elected for one civil district of his county, and having his residence there at the time of his election, and continuously thereafter, with an office in that district, where he holds court regularly on one day of each week to try such causes as are then brought before him, may lawfully open another office in another civil district of his county, and there issue writs, try causes, and deliver judgments on such days of the week as he is not engaged officially in his own district.[1] . . . Whether a justice of the peace does not vacate his office when he practically abandons the office he is required to keep in his own district for an office that he opens in another district." 94, 668. *Strain v. Hefley.* 1895.

Election of Constable — Must be an Actual Vacancy. — MCKINNEY, J.: "It is too clear to admit of any serious question that the vacancy contemplated by the Constitution and by the [2]statute passed in pursuance thereof, is an actual, present vacancy in the office, not a contingent or prospective vacancy; a vacancy that has already occurred, by death, removal, or resignation; vacancies occurring in either way are all in the same category; and an election in advance, in anticipation of a vacancy to occur in future by resignation, is no more allowable than would be an election in advance to fill an anticipated vacancy in future by the death or removal of the incumbent." 36, 294. *Clemmens v. Cato.* 1856.

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[1] T. & S., 4113, 4127, 4128; M. & V., 4888, 4902, 4903.

[2] T. & S., 400; M. & V., 457.

ARTICLE VII.

STATE AND COUNTY OFFICERS.

ARTICLE 7, SECTION 1. There shall be elected in each county, by the qualified voters therein, one sheriff, one trustee, one register—the sheriff and trustee for two years, and the register for four years; but no person shall be eligible to the office of sheriff more than six years in any term of eight years. There shall be elected for each county, by the justices of the peace, one coroner and one ranger, who shall hold their offices for two years. Said officers shall be removed for malfeasance or neglect of duty, in such manner as may be prescribed by law.[1] [Same as Const. 1834, art. 7, sec. 1.]

[Const. 1796, Art. 6, Sec. 1. "There shall be appointed in each county, by the County court, one sheriff, one coroner, one trustee, and a sufficient number of constables, who shall hold their offices for two years. They shall also have power to appoint one register and ranger for the county, who shall hold their offices during good behavior. The sheriff and coroner shall be commissioned by the governor."]

Sheriff—Official Term—Art. 6, Sec. 15.—MCKINNEY, J.: "It is said for the defendants that, in law, Parchmen was not sheriff at the date of the issuance of the execution, namely, on the 11th day of March, 1856; that, under the Constitution ([2]art. 6, sec. 15), the term must be held to commence from the day of the election, which, in this particular instance, was on the 4th day of March, 1854, and consequently the official term had expired before the day of issuance of said execution. This position is not tenable. The Constitution simply prescribes the mode of appointment and the duration of the term. The time and manner of qualification are left to be regulated by the legislature." **40**, 613. *The State for use etc. v. Parchmen.* 1859.

VACANCY IN OFFICE.

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ART. 7, SEC. 2. Should a vacancy occur subsequent to an election in the office of sheriff, trustee, or register, it shall be filled by the justices; if in that of the clerk to be elected by the people, it shall be filled by the courts; and the person so appointed shall continue in office until his successor shall be elected and qualified; and such office shall be filled by the qualified voters at the first election for any of the county officers. [Same as Const. 1834, art. 7, sec. 2.]

Vacancy—Full Constitutional Term.—GREEN, J., held: "Under the Constitution of 1834 the register or other county officer elected at the first election for any of the county officers held after the occurrence of a

[1] See The State *v.* Glenn, art. 6, sec. 4, p. 429; Tatum *v.* Rivers, art. 7, sec. 5, p. 476.
[2] See M. & V., 1016 et seq.

vacancy, is entitled to the office for the full constitutional term, and not merely to the end of the term in which the vacancy has occurred." **21**, 24. *Powers v. Hurst.* 1840.

Act Creating Board of County Commissioners Void—Quarterly Court—Its History—Act to Abolish it—Quasi Corporate Communities—Law of the Land.—The act under consideration was that of March 12, 1868, ch. 65, to create a board of commissioners for the county of Madison, extended by the fifteenth section to the county of White, conferring on such commissioners appointed by the governor the powers of the justices of the Quarterly courts. FREEMAN, J.: "The first question presented for our consideration is, whether the legislature had the constitutional power to do this. And the next is, whether it could be done in the mode attempted; that is, by an exceptional enactment, applicable to one or more counties, and not by a general law, applicable alike to all the counties of the State, or operating equally and alike over the whole territory of Tennessee—in other words, is this the law of the land, within the meaning of the Constitution?

"On the first question there is some difficulty in arriving at a satisfactory conclusion. The County court, or Quarterly court, or court of pleas and quarterly sessions, was part and parcel of the organized machinery of our State government at the adoption of the Constitution of 1834, and had been of the State of North Carolina before the adoption and formation of our original Constitution of government of 1796. By the Constitution of 1796, art. 6, it is provided: 'There shall be appointed in each county, by the County court, one sheriff, one coroner, one trustee, and a sufficient number of constables, who shall hold their offices for two years. They shall also have power to appoint one register and one ranger for the county, who shall hold their offices during good behavior.' By art. 5, sec. 12, it is provided that 'justices of the peace shall be appointed for each county,' and their number was limited to two for each captain's company, except for the company that includes the county town, and in this they should not exceed three. Yet we find in this Constitution no provision establishing such a court. It is simply recognized and treated as one of the existing institutions of the State, well known, and therefore referred to simply as the 'County court.' This institution continued among us down to the time of the formation of the Constitution of 1834; and so far as we can learn from the history of that period, no complaint had ever been made of it—no wish had been expressed by any one to get clear of it or to alter or abolish the system of arrangements of which it was a part, nor to substitute any thing in its stead. We can not learn that the convention of 1834 had any purpose to abolish it, or had any proposition submitted to it looking to such an end. We may safely affirm that if such proposition had been presented it would have been promptly rejected. That convention had

in it much of the best talent of the State, and lawyers whose learning and thorough acquaintance with the machinery of our State government have not been excelled by any who have lived in the State. In arriving at a correct conclusion as to what the Constitution intended to establish, and what to abolish, or its true intent and meaning on questions such as are involved in this case, in the language of Judge Denio, in delivering the opinion of a majority of the court of appeals in the case of The People *v.* Draper, 15 N. Y. Rep., 537, 'we must keep in mind that the Constitution was not framed for a people entering into a political society for the first time, but for a community already organized and furnished with legal and political institutions adapted to all, or nearly all, the purposes of civil government, and that it was not intended to abolish these institutions except so far as they were repugnant to the Constitution then framed.'

"We may assume the proposition to be a correct one, that the intent and meaning of the Constitution, when arrived at in accordance with established principles of construction, is the supreme law of the land to our legislature, and that the legislature has plenary legislative—that is, the law-making—power except in so far as they are restrained by the Constitution of the State or of the United States. The prohibition to exercise a particular power, or make a particular enactment, need not be expressed, however, but may be implied. And that such an implication would fairly arise when we can see from the Constitution that certain arrangements therein provided for, or certain institutions, or parts of the existing organization of the State, are referred to as being the agencies charged with the performance of certain duties by the terms of that instrument, and that the existence of these agencies was contemplated as continuing, and was thus, however remotely recognized by the Constitution, that such reference would amount to a fairly implied constitutional establishment of, or at any rate, recognition of, and continuance of such existing agencies or organizations.

"Now, we look at the fact that, by the Constitution of 1796, article 6, referred to above, the County court is chargeable with the election of certain officers, yet we find no other notice of its organization or establishment in that instrument. We find, however, that as then recognized, it continued in existence as part of the machinery of that well-known, settled, and established political and civil division of our State government, the county, up to the adoption of the Constitution of 1834, and conclude that if such an innovation as the destruction of the County court had been contemplated, or if authority had been conferred on the legislature to make such change, it would have been plainly conferred by express provision. But without insisting on this view as conclusive, we may safely and surely look at the Constitution itself, and see in the light of the facts existent at the time of its adoption, whether or not in

that instrument there is by fair inference a recognition of the existence and intended perpetuation of the Quarterly or County court. If so, the legislature can not abolish it, and supplant it by other agencies, differently constituted, though charged with the same duties and given the same powers. It is provided by art. 6, sec. 15, of the Constitution, that the counties of the State shall be laid off into districts of convenient size, so that the whole number in each county shall not be more than twenty-five; and that there shall be two justices of the peace elected for each district including county towns, which shall elect three, etc. In art. 7, sec. 1, it is provided among other things, 'there shall be elected for each county, by the justices of the peace, one coroner and one ranger, who shall hold their offices for two years.' By section 2 of said article, 'should any vacancy occur subsequent to an election in the office of sheriff, trustee, or register, it shall be filled by the justices,' etc. It will be seen that the same officers are here to be elected by the 'justices of the peace — that is, the coroner and ranger; and, in case of vacancy of sheriff, trustee, and register, that were by the Constitution of 1796, art. 6, directed to be appointed by the 'County court.' It is true that the sheriff and county trustee, who were to be appointed by the County court by said sixth article, are to be elected by the provision of the seventh article, sec. 1, of the Constitution of 1834, by the people, except in case of vacancy. Yet we do not see how any one can take the two articles together, and the facts existent at the time of the adoption of the Constitution of 1834, and not conclude that the only change intended to be made by the convention in art. 6, sec. 1, of 1796, was, that the sheriff and trustee should be elected by the people, but the rangers and coroners were to continue to be elected by the justices of the peace — that is, by the County or Quarterly court, assembled as has been their wont from the foundation of the State; that by 'justices of the peace,' in art. 7, sec. 1, of the Constitution of 1834, was meant precisely the same thing as 'County court,' in art. 6, of the Constitution of 1796. This view of the case is strengthened by the fact that there is no provision for their special assemblage for the purpose of performing the duty with which they are here charged in the election of these officers; and it certainly was not contemplated that their election was to be by the justices, each voting or choosing in his separate district, without concert with his co-justices of the same county."

Judge FREEMAN then cites the provisions of the various acts on the subject, and says: "In these various provisions are certainly contained a clear and unequivocal contemporary view of the provisions of the Constitution of 1834, recognizing, as one of the constitutionally continuing institutions, existent at the time of its adoption, the assemblage of the justices of the peace, in County courts, charged with the election of the officers above referred to, and as a matter of course, with other

duties appertaining to and annexed by law to their assembled organization, known as the County court. In other words, the legislature that assembled immediately after the adoption of the Constitution of 1834, construed that instrument as perpetuating what was known before as the County court; and, as recognizing that certain duties were imposed on said body by the Constitution, which necessarily implied and demanded its continued existence. . . . From this view of the case we are led to the conclusion that the Constitution, in the articles cited, looked to the continued existence of this assemblage of the justices of the peace of the county for the performance of the duties therein imposed, and that it was recognized as an assemblage representing the corporate existence of that constitutional division of our State known as a county; and that this institution, in this aspect of it, must continue until abrogated by the action of the people in changing the constitutional provisions referred to. . . . Inasmuch as justices of the peace are constitutional officers, and their functions as such well known at the time of the adoption of the Constitution of 1834, and as by art. 7, secs. 1 and 2, taken in connection with the established order of things at the time, and contemporaneous construction by the legislature of 1835 and 1836, together with the uniform understanding of all departments of the government from 1834 to the passage of the acts, or class of acts in question, the assemblage of the Quarterly or County court of each county; as the *quasi* representatives of the counties, as corporate or *quasi* corporate communities, is, as we think, most clearly recognized and necessary for the performance of the duties imposed in the Constitution; that no legislature of Tennessee, or any body short of a constitutional convention, can change or alter or abolish this established order of things. This having been attempted in this case, and the law having no other purpose, if this purpose fails, the whole law must be treated as a nullity and declared void. We do not mean in this opinion to adjudge or decide any thing upon the question of the organization of special courts, or of tribunals, of any kind in counties, such as special criminal courts, but to confine this opinion to the simple question of the power of the legislature to overturn the local government, so to speak, of a county, displace the assemblage of the recognized organization representing the county, to whom duties are assigned by the Constitution, and place in its stead other organizations, unknown to our past history up to the passage of the law of which the Act of 1868 is a part, and never contemplated by the Constitution, nor purposed or provided for in that instrument. . . . The first thing that strikes us on looking at this strange enactment of the legislature, is its startling novelty, as compared with any thing that ever existed under our Constitution from the organization of the State to the date of the act. In the second place, we remark that all the presumptions arising from a past history

of about seventy years, without ever having been once suggested by any legislative body, rise up against the idea that such an organization or body was ever contemplated by our fathers, who made the Constitution under which this act was passed. That taxation and representation necessarily go together, was and should be an axiom in our government; and if there is any matter upon which we can say that our people were sensitive at the adoption of our Constitution, above all others, it was the question how, and by what power, the taxes they were to pay should be imposed; and that a strict responsibility should attach to those who did impose them. . . . It will be seen that all the powers of taxation for county purposes, formerly exercised by the Quarterly courts, who were elected by the people and responsible to them — who occupied the position of representative in fact, practically, though perhaps not in theory, is by these enactments transferred to these commissioners, and they appointed by the governor of the State — it is true, after a while to be elected by the people — but the defendants to this bill hold the tenure of their offices by virtue alone of the will of the governor of the State. Can it be believed for a moment that the power was ever intended to be delegated by the people to the legislature to authorize such a body, so appointed and constituted, to perform the functions assigned to them in this act? We think no reasonable man can come to such a conclusion.

"Another view of this question: Here is a power to take from the people their property by taxation, by which they may be destroyed, or burdened with burdens too grievous to be borne; and that by a special enactment, applicable only to a few counties, which are either made the special recipients of this favor by the legislature or the special objects for imposition of these burdens, as it may happen to be viewed. This is not, then, upon sound principle, in any sense a law of the land; and yet it, by and through the agencies put in operation by it, deprives the people of their property at the will of men appointed by the governor of the State. We think this view of the question conclusive as to the unconstitutionality of this law, and upon this last ground would be bound to hold it not a 'law of the land,' and therefore of no validity." 50, 683. [1]*Pope v. Phifer et al.* 1871.

Clerk of County Court—Vacancy—How Filled—Clause Construed.—McFarland, J.: "The question is the meaning of the language, 'that if a vacancy occur in the office of clerk to be elected by the people, it shall be filled by the court.' Clerks of the County court are elected by the people, under previous article of the Constitution, and therefore the clause quoted includes county clerks. But inasmuch as the court is sometimes composed of the justices and sometimes of the judge, the

[1] See same case, art 2, sec. 2, p. 263.

question is, which shall exercise this particular power? The Constitution only provides the general rule, that is to say, the vacancy shall be filled by the court; but as the County court was one of the inferior courts which the legislature might ordain and establish, it results that the legislature might change the constituents of the court and regulate or change its jurisdiction, or in other words, might provide, as it did so, that for some purposes all or a majority of the justices should be present, for other purposes three were sufficient, and finally that the powers and jurisdiction formerly exercised by the three justices should be transferred to the county judge. In other words, while the legislature could not change the general rule of the Constitution, 'that the vacancy should be filled by the court,' it might, nevertheless, say who should constitute the court for one purpose and who for another. This principle is settled in the case of The State *v.* Turk, decided in 1827. The Constitution of 1796 had this clause: 'Each court may appoint its own clerk, who may hold the office during good behavior.' The legislature in the same year passed an [1]act that where any vacancy occurred to be filled by the county court, the court should hold an open, free election, and public notice should be given. In the case referred to this was held to apply to vacancies in the office of county clerk, and further, that the Constitution only provided the general rule, 'that the clerks were to be appointed by the court,' and that it was competent for the legislature to regulate the mode of exercising the power, and that in exercising the power of appointment given by the Constitution, the legislature had required that the court should hold an election and give the public notice. The clause of the Constitutions of 1834 and 1870, in regard to filling the vacancy, is similar to the clause of 1796 in regard to filling the office by appointment in the first instance. So that it was competent for the legislature, either under the Constitution of 1834 or 1870, to provide that this power of filling the vacancy, conferred by the Constitution upon the court, should be exercised in any mode the law-making power might deem proper, or that for the exercise of this power all the justices should be present, or any given number, or that the power might be exercised by the judge." **76**, 79. *The State ex rel. Johnson v. Campbell.* 1881.

ART. 7, SEC. 3. There shall be a treasurer or treasurers (and a comptroller of the treasury) appointed for the State by the vote of both houses of the general assembly, who shall hold their offices for two years.[2] [Const. 1834, art. 7, sec. 3, did not contain provision in parenthesis.]

[Const. 1796, Art. 6, Sec. 2: "There shall be a treasurer or treasurers appointed for the State who shall hold his or their offices for two years."]

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[1] T. & S., 819; M. & V., 1013; Shan. Sup. to M. & V., p. 91. [2] See **55**, 332.

OFFICERS AND VACANCIES.

ART. 7, SEC. 4. The election of all officers and the filling of all vacancies not otherwise directed or provided by this Constitution shall be made in such manner as the legislature shall direct.

[Const. 1834, Art. 7, Sec. 4: "The election of all officers and the filling of all vacancies that may happen by death, resignation or removal, not otherwise directed or provided for by this Constitution, shall be made in such manner as the legislature shall direct."]

[Const. 1796, Art. 6, Sec. 3: "The appointment of all officers not otherwise directed by this Constitution shall be vested in the legislature."]

Chancellor—Vacancy—Appointment by Governor.—BURTON, Sp. J.: "The Constitution of 1870 was not a new Constitution, but in all its main features was a re-enactment of the Constitution of 1834. The same articles and sections are common to both instruments, with the exception of a few, though very important, amendments. Two of these sections have an important bearing on the question under discussion. Art. 7, sec. 4, of the Constitution of 1834 is . . . identical with the corresponding section in the Constitution of 1870, except that the phrase 'that may happen by death, resignation or removal,' is omitted. Sec. 1, art. 11, of the Constitution of 1834 is 'all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by this legislature.' The corresponding section of the Constitution of 1870 is in the same words, with the addition, however, of a clause irrelevant to this discussion. By an Act of 1853, ch. 32, secs. 6 and 7, the legislature directed how these vacancies should be filled. The substance of this act is brought forward in sections 312, 313, 314 and 315 of the Code.[2] The three first sections provide that the governor shall order an election, prescribe the notice to be given and the manner of giving it. Section 315 is in these words: 'In the meantime the governor shall appoint a suitable person to fill the office until the election of a successor.' Was this law in force and use on the 25th day of July, 1871, when Goodpasture was appointed the second time? Clearly it was, unless it was inconsistent with the Constitution of 1870, for it had not expired or been altered by the legislature.

"It is argued, however, that section 315 of the Code is repealed by the paragraph of sec. 5, art. 7, already quoted, which provides, in substance, that no special election shall be held to fill a vacancy in the office of judge except at the next biennial election of civil officers, occurring more than thirty days after the vacancy. These paragraphs are clearly prohibitory in their nature, and being paramount to any legislative enactment did repeal so much of section 315 as authorized the governor to order a special election for judge at a time other than the

[2] M. & V., 348.

biennial election of civil officers. But these clauses do not conflict with the legislative provision that vacancies shall be filled by appointment of the governor, for the time intervening between the vacancy and the election held to fill it. The utmost that it does is to alter the time at which the governor shall cause the election to be held, nor is it easy to see how this restriction as to the time of holding the election can be construed into a repeal of a power of the executive to fill vacancies by appointment.

"The constitutional and legislative provisions can stand together, the former modifying the latter only in prescribing a definite time for holding an election under its provisions." 61, 238. [1]*Gold v. Fite.* 1872.

Municipal Corporations — Appointment and Election of Officers — Appointments by Governor are Provisional. — COOPER, J.: "The Act of 1879, ch. 11, confers the legislative power of the new municipal government, designated the taxing district, upon a 'legislative council,' consisting of commissioners of the fire and police board, three in number, and the supervisors of the board of public works, five in number, and clothes one of the commissioners with the necessary executive and judicial authority. Two of the commissioners are appointed by the governor, with the consent of the senate, and the third is elected by the qualified voters of the taxing district. One of the supervisors is appointed by the governor, with the consent and advice of the senate, one by the Quarterly court, and the other three are elected by the qualified voters of the taxing district. All of the commissioners and supervisors hold office for two years, and at the expiration of the first term are all to be elected by the qualified voters of the corporation. It will thus be seen that for the first two years the people of the district elect one-half of the governing body directly, and have a will indirectly in the appointment of the other half through the governor, the members of the legislature and the justices of the Quarterly court, all of whom are elected by the people. The election of all officers, it should be borne in mind, and the filling of all vacancies, not otherwise directed or provided by the Constitution, are expressly entrusted to the direction of the legislature. Const., art. 7, sec. 4. And the power may be delegated to the County court in the case of county officers. Const., art. 11, sec. 17. After the first two years the people elect the entire governing body directly, vacancies alone being filled by the Quarterly court. At most, the departure from democratic usage is only partial and limited to a period of two years. Even if all of the governing body had been appointed by the legislature, or the governor with the consent of the senate, or by the County court, the popular representation in the election of the appointing power would perhaps have been sufficient to meet

[1] See same case, schedule sec. 1, clause 2.

the requirements of our republican institutions in the absence of express constitutional directions to the contrary. It has been so held by some courts. People *v.* Mahaney, 13 Mich., 500. *A fortiori*, where one-half of the governing body is elected by the people and the other half appointed by the people's servants. But the appointment of one-half of the governing body is expressly temporary and provisional. At the expiration of the first term all of the members are to be elected by the people.

"The question is therefore narrowed down to this: Does the provisional organization of a municipal corporation, in a mode not admissible as a permanent form, render the act creating the corporation void? Thus put, there can be only one answer. Our own statutes contain numerous instances where public corporations, counties and towns have been organized and put into operation by commissioners appointed by the legislature or the governor. And Judge Cooley, in a well-considered case, while expressing a doubt whether the legislature could constitutionally appoint for a municipal corporation in his State, where the Constitution contained express provision for their local appointment, officers whose duties were exclusively local, such as a board of water or sewer commissioners, yet held that it was entirely competent for that body to make provisional appointment of such commissioners to put the new system in motion. 'It corresponds,' he says, 'to the authority which constitutional conventions sometimes find it needful to exercise, when they prescribe the agencies by means of which the new Constitution they adopt is to be made to displace the old.' People *v.* Hurlburt, 24 Mich., 44. The provisional term of two years can not be deemed unreasonable in this instance, in view of the direct popular representation in the provisional body. Conceding, then, that it may admit of doubt whether the legislature could permanently appoint, under our Constitution and the democratic character of our institutions, the officers and governing body of a municipal corporation, its right to make provisional appointments is beyond doubt. The appointment in controversy are, therefore, within the competency of the legislature." FREEMAN, J., and TURNEY, J., dissented. **70**, 439. [1] *Luehrman v. Taxing District of Shelby County.* 1879.

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[1] See same case, art. 2, sec. 17, p. 280; art. 2, sec. 29, p. 355; art. 11, sec. 8.

TERMS OF CIVIL OFFICERS.

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ART. 7, SEC. 5. Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of governor and other executive officers shall be computed from the 15th of January next after the election of the governor. No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed and qualified. No special election shall be held to fill a vacancy in the office of judge or district attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next biennial election recurring more than thirty days after the vacancy occurs.

[Const. 1834, Art. 6, Sec. 5: "The legislature shall provide that the election of the county and other officers by the people shall not take place at the same time that the general elections are held for members of congress, members of legislature, and governor. The elections shall commence and terminate on the same day."]

Terms of Office.—NICHOLSON, J.: "These officers elected in May, 1870, are to hold their offices for the terms fixed by the Constitution. The fact that the terms of those elected in August, 1870, are fixed to commence on the first of September, 1870, while those elected in May, 1870, are not included in that provision, furnishes conclusive evidence that it was not intended that their terms should be postponed until that time, but that they were intended to hold their offices from the date of their election in May, 1870. It follows that Judge Heiskell's term of office commenced from his election and commission in May, 1870. He was, therefore, a legal and constitutional judge in July, 1870, when he presided on the trial of the cause now before us. If it should be asked when his term of office will expire, the answer is, that his term is computed from the first of September, 1870, and will continue for eight years from that date; and until his successor shall be elected and qualified. It results in giving to the officers elected in May, 1870, somewhat longer terms than those elected in August, 1870. But this was unavoidable in changing the times of the elections, and in providing against any interregnum in any of the offices." **56**, 803. [1]*Brinkley v. Bedford.* 1872.

[1] See same case, art. 11, sec. 1; Schedule, sec. 1, clause 1.

Organic Provisions Relating to This Subject—Term of Register.—NICHOLSON, J.: "B. F. Tatum was elected register of Fayette county at the election for county officers, held on the 26th of March, 1870, and was inducted into office on the 5th of April, 1870. In October, 1871, B. F. Tatum died, and his son, E. W. Tatum, was appointed to fill the vacancy. At the regular election, in August, 1872, W. J. Rivers was elected register for Fayette county to fill out the unexpired term, and at the September term, 1872, of the County court, he presented his certificate of election, and his bond, and claimed to be inducted into the office. His right to the office was contested by E. W. Tatum, who claimed that his term, under the appointment of the County court, had not expired. The County court determined that Rivers was entitled to be inducted into the office. From this judgment Tatum appealed to the Circuit court, where the judgment was affirmed, and Tatum has appealed to this court. County registers are to be elected for four years. Const., art. 7, sec. 1. When a vacancy occurs subsequent to an election, it shall be filled by the justices, and the person so appointed shall continue in office until his successor shall be elected and qualified. Art. 7, sec. 2. Elections for judicial and other civil officers shall be held on the first Thursday in August, 1870, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. Art. 7, sec. 5, par. 1.

"The term of each officer so elected shall be computed from the 1st day of September next succeeding his election. . . . No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. . . . Every officer shall hold his office until his successor is elected, or appointed, or qualified. Art. 7, sec. 5, par. 2. These are the permanent organic provisions made to regulate the election of registers, to fix their term of office and to provide for filling vacancies.

"The convention closed its session on the 23d of February, 1870. The general election for county officers was fixed by the legislature for the 26th of March, 1870, and the convention, by ordinance, fixed the 26th of March, 1870, for taking the vote of the people on the ratification or rejection of the new Constitution. According to the permanent provisions of the Constitution, the regular election for judicial and other civil officers was fixed for the first Thursday in August; but the regular election for civil officers other than judicial under the Constitution of 1834, was fixed by the legislature for the 26th of March, 1870. In order to prevent any inconvenience from a change of the Constitution, a schedule was attached thereto, which provided that the governor of the State, the members of the general assembly, and all officers elected at or after the general election of March, 1870, shall hold their offices for the terms prescribed in this Constitution. Under this provision of the

schedule a register elected at the general election on the 25th of March, 1870, would hold his office for the term prescribed in the Constitution, that is, for four years, as prescribed in art. 7, sec. 1; and the term of the register's office to be computed from the 1st day of September next succeeding his election on the 26th of March, 1870, as prescribed in art. 7, sec. 5, par. 2. The necessary result of these provisions was to give more than four years to the registers elected on the 26th of March, 1870, and this was the intended effect of the schedule adopted to avoid any inconvenience from the change of the Constitution. It follows that if B. F. Tatum had lived, his term of office would have expired at the end of four years from the 1st of September, 1870. As he died in October, 1871, E. W. Tatum appointed to fill the vacancy, was only entitled to hold the office until the 1st of September, 1872. The election of Rivers in August, 1872, was valid and constitutional, and he was entitled to be inducted into office by the County court in September, 1872." **66**, 296. *Tatum v. Rivers.* 1874.

Constable—Vacancy in Office—How Filled.—COOPER, J., held: "Upon the happening of a vacancy in the office of constable the sheriff may, since the adoption of the Constitution of 1870, as before, hold an election, under the Code, sec. 401,[1] to fill the vacancy, and the election may be held on the same day and at the same time with the general election for the governor of the State and members of the general assembly." **69**, 461. *Beazley v. Ferris.* 1878.

Public Administrator—Election and Qualification of Successor.—FREEMAN, J., held: "Where a public administrator was elected at the October term of the court, instead of the April term, when his prior term regularly expired, the election was valid and proper, the duty of the court to elect being a continuing one." In deciding this case he said: "It is probable the provision added to the Constitution of 1870, art. 7, sec. 5, 'that every officer shall hold his office until his successor shall be elected, or appointed and qualified,' was intended to meet such a case thus continuing the former officer in office and lengthening his term. In that view the implication is clear that 'an election or appointment' after the regular period, is necessarily contemplated and recognized by the Constitution. So we held in the case of the clerk of the Supreme court at Knoxville, whose term expired in September, but owing to the change made some years since in the time of holding that court, the court did not meet until the next year, when he was re-elected, and held for six years from the last election."[2] **84**, 324. *The State for use etc. v. Anderson et al.* 1886.

County Judge—Term of Office—Is Judge of "Inferior" Court—Vacancy.—A county judgeship for Knox county was created by Acts

[1] M. & V., 458.

[2] M. & V., 547.

1887, chapter 148, and the term of office fixed, by the statute, at four years. Maloney was elected in 1888 to fill said office for said term. In 1892 Rambo was elected as his successor. Maloney refused to surrender the office upon Rambo's demand, and insisted that he was entitled to hold the office for the full term of eight years allotted to judges of 'inferior courts' by the Constitution. Rambo brought this suit to oust Maloney.

CALDWELL, J., held: "Maloney's term expires, under Constitution of 1870, on 1st of September, 1894. The statute is unconstitutional and void, so far as it undertakes to fix the term at four years. Maloney holds, not for a full term of eight years from date of his election, but only for the unexpired judicial term—viz., six years. A county judge is a judge of an inferior court within the meaning of those clauses of the Constitution which authorize the creation of 'other inferior courts' in addition to those specifically named, and provide for election of judges for said courts, and prescribe their terms of office at eight years. The judicial term is uniform under Constitution of 1870, the first term beginning 1st of September, 1870, and ending 1st of September, 1878, and a new term beginning at the latter date, and at the expiration of each succeeding term of eight years thereafter. Vacancies occurring during a judicial term are filled, not for a full term of eight years from the date of occurrence, but for the unexpired judicial term. A county judgeship created during a judicial term, is, in legal contemplation, a vacancy, and filled as such."

In delivering the opinion Judge CALDWELL in speaking of this clause said: "By these provisions a new era in the political history of the State is established. A certain day is named, from which all official life thereafter shall be reckoned. Absolute uniformity in the time for the commencement and termination of every official term of officers of the same grade throughout the State is positively ordained. Though such uniformity had been of but small moment under the Constitution of 1834, it is now made paramount. . . . The language, 'no appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term,' was introduced into the Constitution of 1870 to further insure uniformity in the official terms of officers of the same grade by affirmatively altering the rule existing under the Constitution of 1834. It applies equally to cases where the appointment or election may be made to fill an office for the first time, and where it may be made to fill one whose previous incumbent has died, resigned, or been removed." **92**, 162. *The State ex rel. Rambo v. Maloney.* 1892.

ARTICLE VIII.

THE MILITIA.

ARTICLE 8, SECTION 1. All militia officers shall be elected by persons subject to military duty within the bounds of their several companies, battalions, regiments, brigades, and divisions under such rules and regulations as the legislature may, from time to time, direct and establish. [Same as Const. 1834, art. 8, sec. 1.]

[Const. 1796, Art. 7, Sec. 1: "Captains, subalterns, and non-commissioned officers, shall be elected by those citizens in their respective districts who are subject to military duty."]

[Art. 7, Sec. 2: "All field officers of the militia shall be elected by those citizens in their respective counties who are subject to military duty."]

[Art. 7, Sec. 3: "Brigadier generals shall be elected by the field officers of their respective brigades."]

[Art. 7, Sec. 4: "Major generals shall be elected by the brigadiers and field officers of the respective divisions."]

ART. 8, SEC. 2. The governor shall appoint the adjutant general and his other staff officers; the major generals, brigadier generals, and commanding officers of regiments, shall respectively appoint their staff officers. [Same as Const. 1834, art. 8, sec. 2.]

[Const. 1796, Art. 7, Sec. 5: "The governor shall appoint the adjutant general; the major generals shall appoint their aides; the brigadier generals shall appoint their brigade majors, and the commanding officers of regiments their adjutants and quartermasters."]

[Art. 7, Sec. 6: "The captains and subalterns of the cavalry shall be appointed by the troops enrolled in their respective companies, and the field officers of the districts shall be appointed by the said captains and subalterns; provided, that whenever any new county is laid off the field officers of said cavalry shall appoint the captain and other officers therein *pro tempore*, until the company is filled up and completed, at which time the election of the captains and subalterns shall take place as aforesaid."]

ART. 8, SEC. 3. The legislature shall pass laws exempting citizens belonging to any sect or denomination of religion, the tenets of which are known to be opposed to the bearing of arms, from attending private and general musters. [Same as Const. 1834, art. 8, sec. 3; Const. 1796, art. 7, sec. 7.]

ARTICLE IX.

DISQUALIFICATIONS.

ARTICLE 9, SECTION 1. Whereas, ministers of the gospel are by their profession dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either house of the legislature. [Same as Const. 1834, art. 9, sec. 1; Const. 1796, art. 8, sec. 1.]

ART. 9, SEC. 2. No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State.[1] Same as Const., 1834, art 9, sec. 2; Const. 1796, art. 8, sec. 2.]

DUELS.

ART. 9, SEC. 3. Any person who shall, after the adoption of this Constitution, fight a duel, or knowingly be the bearer of a challenge to fight a duel, or send or accept a challenge for that purpose, or be an aider or abettor in fighting a duel, shall be deprived of the right to hold any office of honor or profit in this State, and shall be punished otherwise, in such manner as the legislature may prescribe. [Same as Const. 1834, art. 9, sec. 3.]

Aiding in Duel Outside of State no Disqualification for Office in This State.—Bill filed by the State on relation of certain citizens to remove the defendant, J. J. Du Bose, from the office of judge of the Criminal court of Shelby county. The cause for removal stated in the bill is that said Du Bose aided and abetted and acted as second in a duel in Arkansas since the adoption of the Constitution of 1870, and was therefore disqualified to enter upon and hold said office.

TURNEY, J.: "The convention ordaining and the people adopting the Constitution must be presumed to have intended to regulate and govern the conduct of those within the State. If there were any doubt of such purpose and intention, that doubt is removed by the closing paragraph of the article cited, to wit: 'And shall be punished otherwise, in such manner as the legislature may prescribe.' Of course the convention did not undertake to clothe the legislature with authority to punish for an offense committed in a sister State or a foreign land. Construing the article as a whole, we conclude the offense specified is limited by the delegation of authority to punish. Each State necessarily has the exclusive jurisdiction to try and punish offenders within its territory. To fight a duel, to aid and abet in one, to give or bear a challenge in Arkansas, is no offense against the laws of Tennessee. Of course, any of these acts inaugurated and participated in in this State, to be consummated in another, is a violation of our Constitution and laws,[2] and the person so violating is amenable thereto." 88, 754. *The State ex rel. v. Du Bose.* 1890.

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[1] See 9, 225, dissenting opinion of Judge PECK; and Acts 1895, ch. 10, p. 18, permitting unbelievers to testify.

[2] M. & V., 4146, 4161.

ARTICLE X.

OATHS—BRIBERY OF ELECTORS—NEW COUNTIES.

ARTICLE 10, SECTION 1. Every person who shall be chosen or appointed to any office of trust or profit under this Constitution, or any law made in pursuance thereof, shall, before entering upon the duties thereof, take an oath to support the Constitution of this State and of the United States and an oath of office. [Same as Const. 1834, art 10, sec. 1.]

[Const. 1796, Art. 9, Sec 1: "That every person who shall be chosen or appointed to any office of trust or profit shall, upon entering upon the execution thereof, take an oath to support the Constitution of this State, and also an oath of office."]

ART. 10, SEC. 2. Each member of the senate and house of representatives shall, before they proceed to business, take an oath or affirmation to support the Constitution of this State (and of the United States), and also the following oath: "I, ————, do solemnly swear (or affirm) that, as a member of this general assembly, I will, in all appointments, vote without favor, affection, partiality, or prejudice; and that I will not propose or assent to any bill, vote, or resolution, which shall appear to me injurious to the people, or consent to any act or thing whatever that shall have a tendency to lessen or abridge their rights and privileges as declared by the Constitution of this State." [Same as Const. 1834, art. 10, sec. 2. Const. 1796, art. 9, sec. 2, did not contain the words in first parenthesis, but was otherwise the same.]

ART. 10, SEC. 3. Any elector who shall receive any gift or reward for his vote, in meat, drink, money, or otherwise, shall suffer such punishment as the laws shall direct; and any person who shall directly or indirectly give, promise, or bestow any such reward to be elected, shall thereby be rendered incapable for six years to serve in the office for which he was elected, and be subject to such further punishment as the legislature shall direct. [Same as Const. 1834, art. 10, sec. 3. Const. 1796, art. 9, sec. 3, read "two" instead of "six" years.]

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ART. 10, SEC. 4. New counties may be established by the legislature, to consist of not less than two hundred and seventy-five square miles, and which shall contain a population of seven hundred qualified voters. No line of such county shall approach the court house of any old county from which it may be taken nearer than eleven miles, nor shall said old county be reduced to less than five hundred square miles; but the following exceptions are made to the foregoing provisions, viz.: New counties may be established by the present or any succeeding legislature out of the following territory, to wit: Out of that portion of Obion county which lies west of the low-water mark of Reelfoot lake; out of fractions of Sumner, Macon, and Smith counties, but no line of such new county shall approach the court house of Sumner or Smith counties nearer than ten miles, nor include any part of Macon county lying within nine and one-half miles of the court house of said county, nor shall more than twenty square miles of Macon county, nor any part of Sumner county lying due west of the western boundary of Macon county, be taken in the formation of said new county; out of fractions of Grainger and Jefferson counties, but no line of such new county shall include any part of Grainger county north of Holston river, nor shall any line thereof approach the court house of Jefferson county nearer than eleven miles (such new county may include any other territory which is not excluded by any general provisions of this Constitution); out of fractions of Jackson and Overton counties, but no line of such new counties shall approach the court house of Jackson or Overton counties nearer than ten miles, nor shall such county contain less than four hundred qualified voters, nor shall the area of either of the old counties be reduced below four hundred and fifty square miles; out of fractions of Roane, Monroe, and Blount counties, around the town of Loudon, but no line of such new county shall ever approach the towns of Maryville, Kingston, or Madisonville, nearer than eleven miles, except that on the south side of the Tennessee river said lines may approach as near as ten miles to the court house of Roane county. The counties of Lewis, Cheatham, and Sequatchie, as now established by legislative enactments, are hereby declared to be constitutional counties. No part of Bledsoe county shall be taken to form a new county, or a part thereof, or be attached to any adjoining county. That portion of Marion county included within the following boundaries: Beginning on the Grundy and Marion county line at the Nick-a-jack trace, and running about six hundred yards west of Ben Posey's to where the Tennessee Coal railroad crosses the line; running thence southeast through the pocket, near William Summers', crossing the Battle Creek gulf at the corner of Thos. Wooten's field; thence running across the Little Gizzard gulf at Raven Point; thence in a direct line to the bridge crossing the Big Fiery Gizzard; thence in a direct line to the mouth of Holy Water creek; thence up said creek to the Grundy county line, and thence with said line to the beginning, is hereby detached from Marion county and attached to the county of Grundy. No part of a county shall be taken off to form a new county, or a part thereof, without the consent of two-thirds of the qualified voters in such part taken off; and where an old county is reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the legislature; nor shall the seat of justice of any county be removed without the concurrence of two-thirds of the qualified voters of the county. But the foregoing provision requiring a two-thirds majority of the voters of the county to remove its county seat, shall not apply to the counties of Obion and Cocke. The fractions taken from old counties to form new counties, or taken from one county and added to another, shall continue liable for their *pro rata* of all debts con-

tracted by their respective counties prior to the separation, and be entitled to their proportion of any stocks or credits belonging to such old counties.[1]

[Const. 1834, Art. 10, Sec. 4: "New counties may be established by the legislature to consist of not less than three hundred and fifty square miles, and which shall contain a population of four hundred and fifty qualified voters. No line of such county shall approach the court house of any old county from which it may be taken nearer than twelve miles. No part of the county shall be taken to form a new county or a part thereof without the consent of a majority of the qualified voters in such part taken off; and in all cases where an old county may be reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the legislature, nor shall said old county be reduced to less than six hundred and twenty five square miles; provided, however, that the county of Bedford may be reduced to four hundred and seventy-five square miles; and there shall not be laid off more than one new county on the west and one on the east adjoining the county of the dividing line, a majority of the qualified voters of said county voting in favor of said divisions; the counties of Carter, Rhea, and Humphreys, shall not be divided into more than two counties each, nor shall more than one new county be taken out of the territory now composing the counties of Tipton and Dyer; nor shall the seats of justice in the counties of Rhea, Carter, Tipton, and Dyer, be removed without the concurrence of both branches of the legislature. The county of Sullivan may be reduced below the contents of six hundred and twenty-five square miles, but the line of any new county which may be hereafter laid off shall not approach the county seat of said county nearer than ten miles. The counties of Marion and Bledsoe shall not be reduced below one thousand qualified voters of each in forming a new county or counties."]

[Const. 1796, Art. 9, Sec. 4: "No new county shall be established by the general assembly which shall reduce the county or counties, or either of them from which it shall be taken, to a less content than six hundred and twenty-five square miles; nor shall any new county be laid off of less content. All new counties, as to the right of suffrage and representation, shall be considered as a part of the county or counties from which it was taken until entitled by numbers to the right of representation. No bill shall be passed into a law for the establishment of a new county except upon a petition to the general assembly for that purpose, signed by two hundred of the free male inhabitants within the limits or bounds of such new county prayed to be laid off."]

ART. 10, SEC. 5. The citizens who may be included in any new county shall vote with the county or counties from which they may have been stricken off for members of congress, for governor, and for members of the general assembly, until the next apportionment of members to the general assembly after the establishment of such new county. [Same as Const. 1834, art. 10, sec. 5.]

Creating and Reducing—Square and Eleven-Mile Clauses.

County Not Containing Constitutional Number of Square Miles.—TURLEY, J.: "The proof in the case shows conclusively that the boundaries of the county do not contain the constitutional number of three hundred and fifty square miles, but much less; and the question is, whether the commissioners can be prohibited by the decree of a court of chancery from organizing the county contrary to the provisions of the Constitution. The convention of the State, which formed the Constitution, thought proper to place restrictions upon the power of the legislature to establish new counties; and, of consequence, any attempt to do so contrary to the restrictions is a void exercise of power, which can and must be stopped by the judicial department of the State. There is no other place to which an appeal can be made, and if the courts can not interfere, the Constitution, if violated, is a dead letter." **21**, 433. *Bradley v. Commissioners.* 1841.

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[1] See **29**, 138, and **76**, 732.

Objects of the Eleven Mile Clause — Construed as Prohibitory. — McKinney, J.: "The legislature, by the Act of 1844, ch. 204, established the county of Grundy out of parts of Warren and Coffee counties. The boundaries of the county are defined in the act; and in reference to Coffee county, it is provided that the line shall be run 'so as not to approach Manchester (the county seat of Coffee county) nearer than twelve miles.' The legislature, by a subsequent act, passed in 1846, and after the organization of Grundy county, took a portion of the territory of Coffee county, embracing two civil districts, and annexed it to the county of Grundy, whereby the line of the latter county was made to approach within less than twelve miles of Manchester. This bill is brought to have the Act of 1846, attaching said two districts to Grundy county, declared void. And it was so declared by the chancellor, and we think properly.

"It must have been foreseen by the framers of the Constitution that, unless the power to establish new counties were carefully circumscribed and guarded, great and irreparable injury might not unfrequently be done, not only to the public, but also to individual interests in the counties whose territory should be taken to establish such new counties, one of the most prominent of which, perhaps, was the necessity which might thereby be forced upon such old counties to change the location of their court houses and county seats. To guard against so serious an evil was unquestionably one of the principal motives which caused the restriction contained in the clause in question to be incorporated into the Constitution. And we construe it to be an absolute prohibition of the power on the part of the legislature, either in the establishment of a new county or in taking from one county a portion of its territory and attaching it to another, or in changing the lines of adjoining counties, to approach the court house of the county whose territory is taken for either of the foregoing purposes nearer than twelve miles. The restriction in question was designed to be a perpetual guaranty against legislative encroachment, in whatever mode it might be attempted. And it is manifest that, upon any other construction, the restriction would be utterly inoperative and unmeaning.

"The argument opposed to this construction would leave it in the power of the legislature to do that by indirection which might not be done directly. It is admitted that to have done by the Act of 1844, by which the county of Grundy was established, what was done by the subsequent Act of 1846, would have been a palpable and undisguised violation of the Constitution. And, if so, by what process of reasoning can it be maintained that a power expressly prohibited in the former instance might be properly exercised in the latter? Surely the reason of the constitutional prohibition had lost nothing of its force, much less ceased to exist. And if, in the establishment of the county, the legis-

lature could not have enlarged the area of the new county so as to have approached the town of Manchester nearer than twelve miles, upon what principle of construction can it do so at a subsequent session so as to approach the town within eight miles? The object is to secure the counties from having their county seats approached nearer than twelve miles; and this object can no more be defeated upon the pretext of enlarging a new county after its organization than in its original establishment. The restriction upon the legislative power is alike operative and imperative in the one instance as in the other. If the reasoning on the other side were correct, it is obvious that the legislature, by a series of aggressive enactments from time to time, might encroach upon any and every county until the line of the new county should be made to approach the very limits of the county seat of the old county; for, if the court house may be approached, upon any pretext, nearer than twelve miles, the constitutional restriction ceases to be operative, and the power to encroach is without limitation. Such an approach to the county seat, leaving the court house at or near the extreme verge of the county, would necessarily produce so much public inconvenience, such inequality of burden and benefit among the citizens of the county, and such deep and general discontent as would of necessity force a change of the county seat, and thereby bring about all the evils to the public and the invasions of private rights which the clause of the Constitution was intended to prevent. A constitutional provision, so wise and salutary in itself, so indispensably necessary for the protection of important interests, public as well as private, and no less essential to the quiet and repose of local communities, can not be disregarded or evaded in the mode attempted in this case." 28, 588. *Gotchers v. Burrows.* 1848.

County a Public Corporation—County Court—Legislative Power—Jurisdiction of Chancery Court in Suit Between Two Counties Where Territory is in Dispute.—TOTTEN, J.: "The bill is filed by the justices of the County court of Maury, who sue for themselves and the citizens of said county against the justices of the County court of Lewis and the sheriff and collector of said county, the parties representing the rights of said counties respectively in the matter in issue. The bill seeks to assert and maintain the right of Maury county to the territory which has been taken from it in the formation of the new county of Lewis. . . . A county is a public corporation, created by the government for political purposes, and invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are, in general, subject to the control of the legislature of the State. 2 Kent's Com., 275.

"The County court, or the justices composing that court, represent the civil and political power of the county, its rights and obligations.

It is through this medium, therefore, that the county, in its municipal character as a corporation, may act or be acted upon. There is no other court or officer known in its organization that can or should represent it. . . . This suit, so far as relates to parties, was formally and properly instituted. It appears that the legislature, by act passed December, 1843, established Lewis county, 'to be composed of fractions taken from the counties of Maury, Lawrence, Wayne, and Hickman.' . . . The Constitution, art. 10, sec. 4, provides that new counties may be established, by the legislature, to consist of not less than three hundred and fifty square miles, and which shall contain a population of four hundred and fifty qualified voters. No line of such county shall approach the court house of any old county from which it may be taken nearer than *twelve miles.* Nor shall said old county be reduced to less than six hundred and twenty-five square miles. Such are the restrictions and limitations imposed by the organic law of the State upon the legislative power and discretion in this respect. . . The act in question has express reference to these constitutional checks. It required the surveys to be made of the several counties, parts whereof were to compose the county of Lewis, and the boundaries of Lewis were likewise to be surveyed and ascertained. It then provides that if there be territory and population sufficient to meet the requirements of the Constitution without infringing upon the constitutional rights of the older counties, then, and in that case only, the county of Lewis was to be organized and established. The act does not, therefore, infringe any of said provisions in the Constitution. If there was not territory enough upon actual survey, or population enough, the county was not to be organized and established. Whether the county could be legally established depended upon these facts, and these were to be ascertained by the commissioners appointed for that purpose under the act. The commissioners having designated the limits of the new county, assumed that said prerequisites did exist, and had been complied with. That is, that the county of Lewis contained three hundred and fifty square miles and four hundred and fifty qualified voters; that its limits did not approach the court house of the older counties nearer than twelve miles, and that those counties had not been reduced to less than six hundred and twenty-five square miles.

"But, in point of fact, this assumption was erroneous, as relates to the county of Maury, in the two particulars before stated. The line, as marked by the commissioners, did approach within twelve miles of the court house of Maury, and the area of Maury was thereby reduced to less than six hundred and twenty-five square miles—that is, was reduced to about five hundred and thirty-seven square miles, and was thus deprived of a considerable portion of its territory and population to which it had a constitutional right. This was occasioned by error, in fact, on the part of the commissioners, and by their failure to comply

with the provisions of the act under which they were appointed. It is now argued, in defense, that a court of chancery has no jurisdiction to relieve in such case, because the act of the legislature is consummated in the establishment of the new county; that the jurisdiction of the court in this respect is preventive only, and that it can not undo the act of the legislature after it has been fully carried into operation. The case of Ford *v.* Farmer, Bradley *v.* The Commissioners of Powel, Gotchers *v.* Burrows, are referred to. In the principle which ruled in Bradley *v.* The Commissioners we fully concur. . . .

"But the court says that the county, under the statute, becomes a political corporation of the State, and a court of chancery has not power to inquire into the validity of the act, and, as we apprehend, a court of law neither. It is not necessary in the case now before us that we question the correctness of this principle. It is true that, in one aspect of the case, the bill seeks to abrogate and abolish the county of Lewis, but we have not considered it in that view, nor assumed in this opinion the facts relied upon for such decree. We regard it as the suit of Maury county, seeking relief, present and preventive, for injuries done and impending to her constitutional rights. In giving relief to the county of Maury we do not abrogate and annul the county of Lewis. We do not consider whether it has been or may be constitutionally established —whether there is territory enough or population enough. We only say what is very evident—that its boundary as designated by the commissioners trenches upon the vested and constitutional rights of Maury. Whether it be free from constitutional objections in other respects we do not determine. The act to establish it is, in its terms and on its face, free from any such exception; but the commissioners in designating the boundary, not conforming to the directions of the act, have invaded the county of Maury and attempted to take from it a portion of its territory and population, and to include them within the county of Lewis. The county of Lewis has taken possession of this territory, has exercised jurisdiction over it, and claims the right to continue that possession and jurisdiction.

"The question, therefore, is between the counties of Maury and Lewis as to the right to the disputed territory. In determining this question we do not necessarily determine that the county of Lewis has no constitutional existence. In this view of the case the principle referred to in Ford *v.* Farmer can have no application. The case of Gotchers *v.* Burrows was simply this. . . . Certainly this case is not in conflict with the view we take of the case now before us. If the act establishing the county of Lewis had designated the boundary in question to be as it was run by the commissioners, there is no question but that it would be considered as a void exercise of power. Can the boundary as erroneously designated by the commissioners, have any

greater sanction or validity? If, upon any principle such boundary may be held as valid, then there remains no check or limit to encroachment upon the older counties. But regarding it as a void designation of boundary, the vested rights of Maury were not affected by it, but remain as if the boundary had not been made. It was the act of the commissioners of Lewis, in which Maury did not concur or assent. . . . We think, therefore, that the plaintiff is entitled to the relief indicated; that the designated boundary is to be regarded as null and void; that the county of Maury is entitled to her original limits, as no boundary has been run for the county of Lewis in conformity to the limitations and restrictions contained in the Constitution, and by which the county of Maury could be limited. The county of Lewis will, therefore, be enjoined from exercising any jurisdiction within the said limits of Maury." **31**, 241. *Maury County v. Lewis County.* 1851.

Old County Must be Measured.—WRIGHT, J., held: "Before a portion of a new county will be restored to the county from which it was taken, it must clearly appear, by an actual measurement of the territory of the old county, and an enumeration of its voters, that her constitutional rights have been invaded." **41**, 264. *Bridgenor et al. v. Rodgers et al.* 1860.

New County—Straight Line Rule.—TURNEY, J., held that the Act of 1869–70, second session, ch. 27, "so far as it merely established the county of Trousdale, is valid; but so far as by the boundaries prescribed it has entrenched upon the counties of Macon and Smith lessening their constitutional area, it is void." Speaking of an English authority, Judge TURNEY says: "In noticing Jewel *v.* Stead, he says: 'The question arose upon a turnpike act, which provided that no toll gate should be erected within three miles of another toll gate, and all that was decided was that the general rule should be adhered to, that when in an act of parliament, distance is mentioned, generally without any other guide the straight line rule is to be adopted. This is one of the cases in which Lord Campbell says that the distance is to be measured by a straight line on the horizontal plane. This measurement of distance on a horizontal plane is a proper mode of measurement, when you are laying down an arbitrary rule to determine whether a particular case comes within an act of parliament or not, there being no question of conduct and of liability by reason thereof; but when the whole question arises upon the conduct of the parties, such a rule, it is submitted, is wholly inapplicable,' etc. From these extracts we see there was no difference in opinion in the application of the straight line rule in the construction of acts of parliament, and that the whole difference is in applying it to contracts between individuals." **61**, 11. *Macon and Smith Counties v. Trousdale County.* 1872.

Although the Creation of These Political Corporations is a Legislative Function, Chancery Court Has Jurisdiction.—SNEED, J.: "It may be stated as the settled law that while the creation of these political corporations is a legislative and not a judicial function, the court of chancery has the jurisdiction and power to see to it that the Constitution and law be not violated in fixing the boundaries of the new counties, and in securing to the old counties out of which the new one is carved so much of its territory as is declared inviolable, or by protecting such other rights of such old counties as are guaranteed by the organic law. We do not understand the doctrine of the case of Ford *v.* Farmer to contravene these principles, but, on the other hand, to affirm them." **63**, 598. *Humphreys County v. Houston County.* 1874.

County Not Estopped by Lapse of Time—Publication of Act.—By the [1]Act of December 15th, 1871, a portion of Hancock county was added to Hawkins county, the line running within eleven miles of the county site of Hancock county. COOKE, J., held: "Upon a bill filed by Hancock to restore the territory that complainant was not estopped by mere lapse of time, in ignorance of the fact that there was an encroachment upon the constitutional limits of Hancock county. An act of the legislature properly passed and regularly approved does not become invalid by reason of a failure to publish the same among the acts of the legislature." **83**, 267. *Hancock County v. Hawkins County.* 1885.

Reduction of Area—Lost Territory—Power of Legislature to Restore. LURTON, J., held: "Reduction of the area of an old county below the constitutional minimum of five hundred square miles can not be effected either by act of the legislature or *a fortiori* of the County court. . . . But the legislature has the power to restore to a county territory which it may have lost by its laches and long acquiescence in the claim and possession thereof by another county, and for that purpose to detach that territory from the latter county, although the area be thereby reduced below the constitutional minimum." **89**, 258. *Roane County v. Anderson County.* 1890.

Affirmative Consent of Two-Thirds of the Voters Required.—TURNEY, J.: "The language of the clause is plain and unambiguous. 'No part of the county shall be taken off without the consent of two-thirds of the qualified voters in such part. The word 'consent' here means the active concurrence, and can not be substituted for by a passive acquiescence. The argument that two-thirds of the votes cast, and the authorities persuasive to that view of the question can be of no service here. First, and mainly, because it is not contemplated by the framers of the Constitution that the 'consent' shall be ascertained by ballot any more than it was that it should be arrived at in any other mode the legislature

[1] M. & V., 26.

may have seen proper to adopt, and to hold that a two-thirds vote of those who attended the election and cast their ballots shall determine the matter, would be to hold that an election in the ordinary way is the only mode in which the consent required may be obtained or made certain, this would place the legislature above the Constitution and independent of the people. The fact that the Constitution demands in general terms the consent of two-thirds, and fixes no means of getting at that consent, but leaves the means to an enabling act of the legislature, is of itself conclusive that it intends its language to have the active construction that two-thirds shall speak affirmatively. In the instrument itself we have positive authority for the interpretation already given. In art. 2, sec. 27, it is provided. . . . Here we have an expression for elections that shall be binding upon those not voting, and in it the milder term 'assent' is used, because their actual approbation is not required as in the clause under consideration. Having in this clause prescribed the mode in which the people may proceed to onerate themselves with burdens of taxation in terms understood by themselves without the aid of argumentative construction. We must conclude that the clause before us, being of a nature kindred to the one just referred to, was intended to be equally clear and certain, expressing on its face the full and true intent and meaning of the instrument containing it. We can not presume that the framers of the Constitution did not understand the force of this language, or that they meant the plain and unambiguous expressions employed to mean more or less than their face imparts." **52**, 310. *Cooke et al. v. Gooch et al.* 1871.

Old Doctrine Reaffirmed—Acts 1889, Chapter 194.—SNODGRASS, J., held: "A statute changing the line between two counties is unconstitutional if it cuts off territory from one county which lies within eleven miles of its court house and transfers such territory to the other county." **90**, 541. *Union County v. Knox County.* 1891.

County Territory—Legislative Restrictions as to Dividing Counties.—CARUTHERS, J.: "The legislature, on 27th of February, 1856, passed an act by which a portion of the county of Marion was attached to the county of Grundy. This bill was filed by Marion, to have her territory restored, upon the ground that said act was unconstitutional. By the Constitution, art. 10, sec. 4, the last clause, the county of Marion 'shall not be reduced below one thousand qualified voters' in forming any new county. And, by a previous general clause, including Marion, no old county 'shall be reduced to less than six hundred and twenty-five square miles.' The bill alleges that the Constitution has been violated by the act in question in respect to population as well as territory.

"It appears that by an act of the same session, passed two days before, ch. 162, sec. 3, the first and second civil districts of Marion were

attached to Hamilton, but this was not to take effect until the 21st of September, 1857. The proof shows that without the two districts annexed to Hamilton, and the fraction attached to Grundy, the area of Marion would be only four hundred and ninety-two and one-half square miles, and the number of qualified voters eight hundred and seventy, including those in the part attached to Grundy. It is left to be inferred from the proof, and we suppose the fact to be so, that if the two districts were not detached from Hamilton, then both the territory and population of Marion would be sufficient to save the act in question from constitutional objection. So the case must turn upon the question, whether, at the time the act complained of was passed, the first and second districts constituted a part of Marion? Two days before they had been stricken off and attached to Hamilton, so far as the legislature had power to do it. But it is said that it was not to take effect until the next September. What of that? The deed was done, and no conditions affixed. The territory and population were transferred, and nothing remained to be done by any power—nothing but the lapse of seven months was required to consummate the deed. It must be regarded, then, that the legislature had exhausted its power—and, perhaps, more than its legislative power (but that question is not in this case), in dismembering this little county, before the last act was passed; and, if so, the same is unconstitutional. . . .

"The unceasing efforts and ingenious devices adopted to evade or break loose from these restrictions, designed for the protection of old counties, against that restless desire for change, on the part of the people in particular sections, which is often fanned, if not kindled, by aspirants for their own benefit, demonstrate the necessity of the prohibition. The members of the convention, as wise and practical men, foresaw this evil, and endeavored to prevent it. It is the duty of the courts to favor and firmly maintain that policy. And this court has not failed to do so in all cases which had not passed beyond the control of the courts before the institution of the proper proceedings. . . . We are of opinion that the Act of February 27, 1856, ch. 248, so far as it relates to Marion county, is in conflict with the Constitution, and therefore void." **37**, 492. *Marion County v. Grundy County.* 1858.

Liability of Old and New County for Debts of Old County.—This case was a motion in the Circuit court of Perry county against the defendant, as trustee of said county, for the non-payment of several claims held by the plaintiff against the county. Motion dismissed. Plaintiff appealed. TOTTEN, J.: "It is objected that the county of Perry is not liable to pay the claims, but that they are properly a charge upon the county of Decatur. By the Act of 1845, chapter 7, that portion of Perry, west of Tennessee river, was detached from Perry, and organized into the new county of Decatur—leaving the county of Perry with

its original organization, but a diminished territory. The ninth section of the act provides, 'that all debts and liabilities which may now be due and owing by the county of Perry, shall be liquidated and paid by each county respectively, in proportion to the tax lists taken for the year 1845, until said debts are paid. It appears by the answer of the defendant to interrogatories filed for discovery in this proceeding, that at the time of the division of Perry county, under said act, its debts and liabilities amounted to $2,410.72, whereof, having reference to the tax list of 1845, and the provision of said section, the sum of $1,109.38½, was chargeable to the county of Perry, and $1,301.33½, to the county of Decatur, and that the county of Perry has paid its portion of said debts. And the claims in question being of a prior date to the division of said county, it is insisted that they are properly a charge on the county of Decatur.

"There can be no question, but that, as between the two counties, Decatur is liable under said section, for its proper portion of the debts of Perry existing at the time of the division. The liability is imposed by the same law, which gives it existence as a county, and it is as much bound by this provision as by any other in the law. It is certainly the duty of the County court of Decatur to take proper action to perform this obligation, by providing funds and ordering its trustee to make the proper payments, as it would be neither legal nor proper for him to make the payments without such order.

"But as relates to the creditors of Perry, it was not intended by the act, nor was it competent for the legislature to release the county of Perry from its liability to them, and to transfer their credits to the county of Decatur. The county of Perry remains under its original organization, but with a restricted territory; the obligations to which it was subject likewise remain, until they shall be discharged. The creditor has the right to insist that his contract be not violated; and his contract being with the county of Perry, he may insist upon its obligation. It is certainly true, as before intimated, that the county of Perry has its recourse for indemnity, upon Decatur, in a proper proceeding instituted for that purpose." **30**, 534. *Howard v. Horner.* 1851.

Old Counties—Tax Assessors for Fractions Thereof.—TURNEY, J.: "The first question presented by the bill is as to the constitutionality of the act of the legislature, passed March 18, 1875, entitled 'An Act to enable old counties from which fractions have been taken to form new counties, to appoint tax assessors for said fraction and to collect taxes therein.' . . . The act . . . is simply an enabling act to art. 10, sec. 4, of the Constitution, and is intended to furnish a remedy for the enforcement of the rights defined and declared by it. Its passage was, therefore, not only within the power of the legislature, but strictly within the line of its duty." **71**, 120. *Matthews et al. v. Blount County et al.* 1879.

Abolishment of Counties.

Power of Chancery Court to Abolish New County.—TURLEY, J., held: "A court of chancery has no power, at the instance of individual citizens, to abolish a new county after it has been organized and put into operation, upon the ground that the act of the legislature directing the organization was violative of the State Constitution; but it may interfere, at the instance of an old county whose territorial limits are constitutionally trenched upon, to secure to it its vested rights by forcing back the lines of the new county the required distance." 28, 152. *Ford v. Farmer et al.* 1848.

Legislature Has No Power to Abolish and Partition County — How this Must be Done a Doubtful Question — County a Government Within a Government.—TURNEY, J.: "An act of the legislature, approved March 11, 1890, by its first section abolished the county of James, and restored its territory to the counties of Hamilton and Bradley, from which it had been formed in 1871. This bill is filed charging that the Act of 1890 is unconstitutional and void, enjoining action under it, and asking that it be declared null. . . . Art. 10, sec. 4, contains all the provisions on the subject of counties, county lines, etc. From it, it is clearly manifest the authority and only authority conferred is to build up, and not to pull down. It is equally apparent that it never occurred to the framers that a county could be destroyed or dissolved by an arbitrary act of the legislature. The expression of the one thing is the exclusion of the other. If the Constitution is so careful of the rights of old counties in taking from them fractions to form new counties; if it is so watchful of the rights of citizens in county seats, it follows that it is also jealous of any power that might utterly destroy old counties. At the passage of the act before us, James county was, in a legal sense, as much an 'old county' as Washington or Davidson, and had all the rights of such. In all the cases that have arisen in the State touching county lines, the reduction of counties to form new ones, the removal of county seats, etc., the courts have invariably held to the restrictions of the Constitution. If two-thirds of the qualified voters in the part taken from an old county to go to the formation of a new is required, why is not the same principle, derived from the same instrument — the Constitution — applicable to the effort to divide an old county into two parts, giving one part to Bradley and another part to Hamilton? If it requires two thirds of the qualified voters of a county to remove its seat of justice to another point in that county, by what process of reasoning can we conclude that a seat of justice may by legislative enactment be divided between the seats of justice of two adjoining counties?

"If the voters must by a two-thirds majority consent to a removal or to a detachment from one and attachment to another county by the terms of the Constitution, why is not the same rule applied to the purpose of dissolving a county, and then attaching its several parts to other counties, if it can be done at all?—a very doubtful question. . . . It is insisted that as the Constitution does not prohibit by its terms the dissolution of a county, therefore the legislature may dissolve it. The answer to this argument is, as we have already intimated, that it was never intended that such thing should be done, unless, perhaps, by a vote of the people (about which we intimate no opinion), as in the case of the taking off a part of a county to form a new one, which is a partial dissolution, and the only one provided for in the Constitution.

"A county is a government within a government, and its voters must be consulted in all matters pertaining to it. It is not created, nor can it be dismembered or destroyed by an arbitrary legislative breath. The legislature having once granted its consent, can not of its mere motion withdraw it. The county was made at the instance of the people, and for its people, and can be changed or abolished, when at all, only by their consent. If the legislature may dissolve one county and divide it out amongst its neighbors, it may abolish all and destroy the State. It may divide Davidson or Knox, and remove their county seats to any other county by its legislative partition. The sole purpose of the Constitution was to build up and preserve, hence its restrictions about legislative interference with organized counties. It may be said to have been the policy of the framers of the Constitution of 1870 to encourage the creation of new counties, as it reduced the approach to county seats of old counties in the formation of new ones to eleven miles instead of twelve, as ordained by the Constitution of 1834.

"We are aware of but one case in the Union in which the question here presented has arisen—The People *v.* Marshall, 12 Ill., 391—in which it was held: 'The legislature can not abolish counties and form the territory of which they were composed into one or more counties without submitting the act to a vote of the inhabitants affected by the change.' In that case the county of Gallatin had been divided, and the county of Saline formed of part of it. The legislature undertook 'to create the county of Gallatin out of the counties of Gallatin and Saline,' in other words, to abolish Saline and add its territory to Gallatin. The Constitution of Illinois is in this respect very similar to ours. The fact that the question has only arisen in the two cases goes to show that legislatures have heretofore interpreted Constitutions as giving no such power, either by implication or in terms. If desirable to abolish or change counties, the people interested ought to be consulted. Such are the spirit and policy of constitutional popular governments. They can and ought to be carried out. The legislature can not do indirectly

a thing not to be done directly. To abolish a county and give its territory to others is to take from the one and add to the others without the consent of the people to be affected. A Constitution which prohibits a small taking off, or appropriation, certainly protects against entire destruction. The act is void." 89, 240. *James County v. Hamilton County.* 1890.

Removal of County Seat—Concurrence and Consent of Voters.

Self Operative Clause of This Section—"Concurrence," Meaning of.—McHENRY, Sp. J.: "The Act of 1873, ch. 103, . . . sixth section thereof is in these words: '*Be it further enacted*, That the county seat shall not be removed to any place unless a vote is cast for the removal to said place equal to two-thirds of the votes cast in the next preceding governor's election.' . . . Our first inquiry on this point is, what do the terms 'concurrence of two-thirds of the qualified voters of the county' mean? In the case of Cocke *v.* Gooch, MS. opinion, delivered at Jackson in 1871, the first clause of the Constitution above copied came before this court for construction. . . . 'The court says the word 'consent' here means the active concurrence, and can not be substituted for by a passive acquiescence. Instead of presuming that those who did not vote in the election meant by their non-action to submit to the result of a count of the votes *cast*, we hold that a proper reading of the Constitution and enabling act authorizes those who did not vote to conclude that their votes against the project could avail nothing, as a fixed affirmative numerical strength was absolutely necessary to the success of the new county.' Such is the law. This construction of said clause is strengthened by a citation in said opinion of the different reading of a part of sec. 29 of art. 2 of the Constitution, in regard to the credit of a county, city or town given, or loaned to, or in aid of any person, company, association or corporation. Then follows this language: 'Except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.'

"In the clause under discussion in this case the only difference in the language employed is that 'concurrence' is used instead of 'consent.' These words are used in that part of the Constitution we are construing synonymously and interchangeably. All the reasons which have been stated or exist for construing 'consent' to mean an active, affirmative act, on the part of the voter, to manifest his consent, apply with equal force to give a like construction to the word 'concurrence,' and this we do. It follows the sixth section of the act in question is unconstitutional. The Constitution requires two-thirds of the qualified voters in the county to concur in the removal. The mode of concur-

rence is left to be prescribed by the legislature. The section of the act we are considering requires a vote of two-thirds of the qualified voters of the county, on the basis of 'the next preceding governor's election.' The Constitution requires two-thirds of the qualified voters at the time the vote is taken. The sixth section is repugnant to the Constitution, and is void. The number it requires, we add, may be the same as that demanded by the Constitution. It may be more or less. The number of qualified voters in the county, when the vote is taken, is a question of fact, to be determined like all other questions of fact—upon the proof. The number of votes at the next preceding governor's election may, perhaps, be looked to as evidence in ascertaining the number of qualified voters in the county when the vote was taken, but not otherwise. The increase and diminution of voters, consequent on immigration and emigration of voters, keeps the voting population of a county in continual fluctuation.

"The question now arises, if the sixth section of the Act of 1873 be unconstitutional, are its other sections valid and constitutional? . . . Let us suppose the legislature had wholly omitted from the act the sixth section. In such case no serious difficulty could have arisen. The Constitution itself provides, as we have seen, that the number of votes concurring for the removal of the old county seat must be two-thirds of the qualified voters of the county. This number can not be varied by legislation. All that was necessary to carry this provision into effect was for the legislature to yield its assent, and direct the mode in which such concurrence should be manifested. And the fact that the sixth section is declared unconstitutional can have no greater effect than if it had been wholly omitted from the act. The Constitution, in this clause, is self-operative. It co-operates, so to speak, with the other sections of said act, and taken together, there remains legislation adequate to carry out and effectuate fully the legislative will, as evidenced by the various remaining sections. The leading primary and fundamental purpose of the act was to enable the people, in conformity with the Constitution, to remove the county seat. That power remains with the sixth section declared unconstitutional, and the clause of the Constitution under consideration in place thereof executing itself." 62, 269. [1]*Bouldin v. Lockhardt.* 1873.

Legislature Can Not Remove County Seat.—DEADERICK, J., held: "The legislature can not, by direct or indirect means, remove a county seat. It can only be done by the concurrence of two-thirds of the qualified voters of the county." 67, 141. *Stuart v. Blair.* 1874.

By Vote "Equal" to Two-Thirds of Previous Vote.—INGERSOLL, Sp. J., held: "The enabling Act of 1873, chapter 103, providing that a

[1] See same case, art. 6, sec. 10, p. 450.

county seat may be removed to any place in the county by a vote equal to two-thirds of the votes cast in the next preceding governor's election, is in conflict with" this section. 69, 195. *Bouldin et al. v. Lockhardt et al.* 1878.

Ascertainment of Popular Desire and Act of Removal Must be at Same Time.—COOPER, J.: "The Act of 1881 provides for an election 'to ascertain if the people desire the county seat removed from its present location.' And at the election for this purpose a concurrence of two-thirds of the qualified voters is required. The act then requires another election to be held to determine the place where the county seat is to be located, at which election a majority of the votes shall prevail. In other words, the popular 'desire' for a change must be shown by a two-thirds vote, while the actual removal may be determined by a bare majority. But the Constitution says nothing about ascertaining the popular 'desire,' by an independent vote, to a change in the abstract, and forbids the county seat to be 'removed' without the concurrence of two-thirds of the qualified voters. And it is difficult to conceive how the seat of justice of a county can be 'removed' from one place until it has been actually transferred by law to another place. The Constitution manifestly contemplates that the old seat of justice shall continue as originally located until there is an actual removal to another place by the required vote. The desire and the removal, the will and the deed, must concur in one and the same election. If it were otherwise, there might be repeated elections before a majority vote could be obtained for any one locality, the people of the county excited and corrupted by the struggles of private interests, and the property owners of the county town kept in a state of protracted uncertainty. A change of the seat of justice ought clearly not to be made unless the public interests unmistakably point to the new locality. The act of the legislature which allows the removal by a bare majority is clearly unconstitutional." 79, 29. *Combs et al. v. Stumple et al.* 1883.

There Must be Active Concurrence, Not Passive Acquiescence.—COOPER, J., held: "There must be an active concurrence and not a passive acquiescence, and therefore two-thirds of the qualified voters must actually vote in favor of the removal." But after referring to the decisions holding this, he said: "I am, myself, unable to see any distinction between the meaning of the words 'consent,' 'concurrence,' and 'assent,' as used in the clause of the Constitution cited, and am inclined to think that the rule adopted in the Railroad Company *v.* Davidson County, for the construction and application of analogous words in a statute, might well have been followed in construing and applying the language of the Constitution. But this court has thrice announced a different doctrine, and a majority of its members are not inclined to change it." Judge COOK dissented. 84, 581. *Braden et al. v. Stumph et al.* 1886.

Seat of Justice — Special Court — This Clause Construed. — The question here was the validity of the Act of 1891, ch. 26. T. S. WEBB, Sp. J., held: "The statute establishing a special law court for five of the seventeen civil districts of a county, to be held at a place other than the county seat of such county, is not in conflict with that clause of the Constitution which forbids the removal of 'the seat of justice of any county . . . without the concurrence of two thirds of the qualified voters of the county.' The establishment of such special court does not operate to remove 'the seat of justice' of the county."

In delivering the opinion, he said: "The seat of justice, within the meaning of the Constitution, is what is commonly called 'the county seat.' It is the place where the County court and the jail and the county officers are located, the place where the Chancery and Circuit and County courts are held, and where the county records are kept. The seat of justice is located with reference to the convenience of the citizens of the county. After it is located, the County court is required by law to erect a 'court house, jail, and other necessary county buildings.' Code, sec. 408.[1] The money to purchase the land and erect the buildings is raised by taxation. The citizens of the county pay the taxes. The land and buildings cost a large sum of money. The buildings are modeled and constructed with a view to the purposes for which they are to be used, and are not adapted to other purposes. A removal of the seat of justice would leave this property, for which the citizens of the county have paid in taxes, on the hands of the county, to be held at a total loss, or sold at a great sacrifice; and the citizens must be immediately taxed for the purpose of building a new court house and jail and other county buildings at the new county seat. Moreover, the county seat might be removed to a point very inconvenient of access to a majority of the citizens. Thus, any arbitrary removal of the county seat might subject the citizens of the county to both pecuniary loss and great inconvenience. To prevent these hardships, the Constitution has expressly provided that county seats shall not be removed without the concurrence of two thirds of the qualified voters of the county." **92**, 85. [1]*Ellis v. The State.* 1892.

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[1] See same case, art. 1, sec. 9, p. 81; art. 6, sec. 1, p. 409; M. & V., 467.

ARTICLE XI.

MISCELLANEOUS PROVISIONS.

Laws In Force—Laws Abrogated.

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Article 11, Section 1. (All laws and ordinances now in force and in use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire or be altered or repealed by the legislature.) But ordinances contained in any former Constitution or schedule thereto, are hereby abrogated.[1] [Const. 1834, art. 11, sec. 1, and Const. 1796, art. 10, sec. 2, contained only the clause in parenthesis.]

Laws of North Carolina in Force in Tennessee—Act of Cession.—It was urged that the statute under which defendant was indicted was passed in North Carolina in 1799, and was not in force in Tennessee. White, J.: "It has been urged, that, although this statute may at this time be in force in North Carolina, yet it is not in force in Tennessee. Because by article 10 and schedule to the Constitution of this State, no law of North Carolina is in force, except such as is consistent with our new form of government, and had been before in force and use in this part of the country; that this statute had not been in use, and therefore is not one of those that was enforced by that provision. In 1779, when this statute was enacted, what is now Tennessee formed a part of the State of North Carolina, and continued to be a part of it until ceded to the United States in 1789. During ten years, then, it would seem, this statute must have been, legally speaking, as much in force and use here as in any other part of North Carolina. In the Act of Cession, there is a provision that the laws of North Carolina, so far as is consistent with our new situation, should continue in force. The territorial government continued until the year 1796, when a Constitution was formed, and Tennessee became a member of the Union. In that Constitution, and in the article referred to, the members of the convention provide for a continuance of all the North Carolina laws which had been in force and use, and were not inconsistent with our form of government.

"It has not been pretended, and, it would seem, can not be with propriety, that there is any provision in this statute inconsistent with our

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[1] See **4**, 9, and **9**, 6.

Const. 1796, Art. 10, Sec. 1: "Knoxville shall be the seat of government until the year one thousand eight hundred and two."

form of government while a territory, nor since we became a State. But the argument is, that it must be shown that this statute was in use as well as in force, during the territorial government, otherwise it is not one of those enforced by the Constitution. Upon this point the record is silent. It does not show whether any individual was indicted under this statute or not, during the territorial government. Nor do we conceive it necessary such proof should be afforded. This State is not in the situation of a State adopting the laws of some foreign country, which laws must be proved, in order to enable the courts to know what they really were. In all our different changes we retained those laws to which we had been accustomed, and with the provisions of which we are presumed to have been acquainted, with the exception of those that were inconsistent; first, with the territorial, next with the State government. And it really would be a novelty to call for proof, in every case that depends upon any law except a statute of Tennessee, that such law had been in use in every form of government under which we had lived. To give this statute effect, we do not deem it necessary to know that any man was indicted under it during the territorial government. Every criminal law of North Carolina that was in force during the territorial government may be said to have been in use likewise. So long as the citizens conformed their conduct to the precepts of the laws, they used them. If they did those acts which the laws required they should perform, and abstained from the commission of those acts which the laws forbade, they used the laws. To make the law in use, it is not considered essential that there should have been an offender to whom the vindictive part was applied." 2, 257. *Brice v. The State.* 1814.

Entry-Taker—Laws, Obsolete and Repealed—North Carolina Statutes. —WRIGHT, J.: "The Act of 1777, ch. 1, sec. 18, provides that if entry-taker be desirous to make any entry of lands in his own name, such entry shall be made in its proper place before a justice of the peace of the county—not being a surveyor or assistant—which entry the justice shall return to the County court at their next sitting; and the County court shall insert such entry, and every entry made by or for such entry-taker in any other manner than is herein directed, shall be illegal and void, and any other person may enter, survey, and obtain a grant for the same land. It is argued that this section of the Act of 1777—if it ever was the law of this State—has become obsolete, or been repealed, and, in any event, is inapplicable to that portion of the State which lies south and west of the congressional reservation line. It seems not to have been considered as repealed or obsolete by Messrs. Haywood & Cobb, and is preserved in their revisal of the statutes of Tennessee, and not embraced in the 'table of repealed and obsolete laws.' 2 Hay. & Cobb's Rev., 20, 190. It is clear that it originally applied to the entire

vacant territory of the State of North Carolina, extending as far west as the Mississippi river, and including these very lands. Acts 1777, ch. 31; 1783, ch. 2, sec. 3 (1 Scott's Rev., 221, 267); 2 Meigs' Dig., 662. And it is equally plain that it was in force and use in the State of North Carolina at the time of the passage of the Cession Act of 1789. Tyrell *v.* Mooney, 1 Murphey, 375, 401; Terrell *et al. v.* Logan, 3 Hawks., 319. And, therefore, became a law of the ceded territory and of the State of Tennessee upon the adoption of the Constitution of 1796.

"The Cession Act provides that the laws in force and use in the State of North Carolina at the time of its passage shall be and continue in full force within the ceded territory until the same shall be repealed or otherwise altered by the legislative authority of said territory. And in the Constitution of this State, in 1796, it was declared that all the laws then in force and use in said territory, not inconsistent with the Constitution, should continue to be in force and use in this State until they should expire, be altered, or repealed, by the legislature. The Constitution of 1834 has a clause to the same effect. We are not able to perceive that this section of the Act of 1777 has expired or become obsolete. It is, upon the face of it, perpetual, without limitation or time fixed when it shall cease to be in force; and we are bound to give it effect, in every case which falls within its provisions, until it is repealed by the legislature. Brice *v.* The State, 2 Tenn., 255, 256. It may be that no entry has been made under its requirements, even for half a century. But how are we to know that? The record does not inform us how the fact is. And if it were so, we do not understand that a statute can be repealed by non-user. The want of individual cases under it, or the existence of a series of cases in violation of it, ought not, we apprehend, to destroy the law. Dwar. on Stat., 9 Law Library, 29, top page; Brice *v.* The State, 2 Tenn., 255, 256, 257, 258.

"Then has it been repealed or so altered by the legislature as to enable us to dispense with its provisions? It is insisted it has upon various grounds. First: It is said the Act of 1777, if ever of force, being so only by the Cession Act and Constitution of 1796, any alteration of it being by the legislative authority of the territory or State, though it did not touch the eighteenth section, would satisfy the Cession Act and the Constitution, and put an end to the entire act; and that such alteration having been made as early as 1799 and 1801, this section is not now in force in this State, nor has been for half a century. This position is untenable. The repeal of a statute may be total, or only partial, according to the will of the legislature; and we know of no difference, in this respect, between the statute of the State of North Carolina, made of force here by the Cession Act and Constitution, and one of our own enacting. And that there is no such difference will appear from the authority of Brice *v* The State. See also The State *v.*

Patterson, 2 Ired., 356. Unless the section itself has been repealed or altered, it must be declared in force." **39**, 328. *Egnew et al. v. Cochrane et al.* 1859.

Section 5 of the Schedule of 1865.—NICHOLSON, J.: "If the schedule to the amended Constitution ever had the effect of making null an execution or levy thereon, issued and levied in pursuance of the Act of 1861, which we are far from conceding, yet it is manifest that the fifth section of the schedule of 1865 was abrogated by the first section, art. 11, of the Constitution of 1870, by which it is provided that 'ordinances contained in any former Constitution, or schedule thereto, are hereby abrogated.' This includes, and was clearly intended to include, the section in the schedule of 1865, which declared 'all laws, ordinances and resolutions, as well as all acts done in pursuance thereof, under the authority of the usurped State government of Tennessee, on or after the 6th of May, 1861, unconstitutional, null and void from the beginning.' The abrogation of this section by the Constitution of 1870 removes all doubt as to the validity of the execution and the levy thereof, and of the satisfaction of the judgment as to the security."[1] **53**, 81. *Fuller & Mitchell v. McFarland, Adm'r.* 1871.

State and Federal Constitutions—Nature of State Powers—Schedule of 1865.—"Another question presents itself in reference to the validity of the law passed by the legislature of 1862. As a matter of history, we know that the country was then engaged in the late civil war. Tennessee was one party to the strife, by the action of her people, and was declared to sustain the enemy relation to the United States by the well-known proclamation of the president of the United States, made in pursuance of a law of congress. By the schedule of the amendments to the Constitution of the State, of 1865, it was declared that all laws and ordinances passed from and after the 6th of May, 1861, were null and void, we suppose upon the ground either of the opinions held by the members of the legislature on the questions between the parties to the war, or the fact that the State was then in rebellion against the United States, or perhaps on the theory that the members of that legislature were engaged in acts of treason, or were themselves traitors. This ordinance was abrogated by sec. 1, art. 11, of the Constitution of 1870, thus leaving the validity of such laws as were passed by the legislature during the period of the war to be tested upon general principles, applicable to laws passed by legislative bodies under our system of written constitutions, which constitutions are the tests of the validity of all legislation. We need only to say with reference to the theory that all acts passed by the legislatures of States engaged in rebellion against the United States were void, that it is one which, so far as we can see,

[1] See also Rice et al. *v.* O'Keefe et al., **53**, 639.

is based upon no principle of general law, nor upon any growing out of the peculiarities of our constitutional system of government, and that the schedule of the Constitution of 1865, as to this subject, was a purely arbitrary declaration of the will of the body which promulgated it.

"It must be sustained, if at all, upon the idea that a State of this Union is such, and can exercise its powers as such—in a word, can have legal or constitutional existence—only by virtue of its relation to and connection with the Federal Union, as one of its integral parts. In this is ignored the principle that underlies our entire theory of government, both State and Federal, as viewed in the Constitution of the United States, on almost every page, that the States composing our Federal Union are well defined entities—constitutional organizations—having life independently of their connection with the Federal Union. This principle is distinctly recognized in the preamble to the Constitution of the United States: 'We, the people of the United States, in order to form a more perfect union,' etc.; the union of the States having been found imperfect under the old Articles of Confederation. We need not enumerate the various clauses of the Constitution of the United States in which the principle is recognized. We need but refer to sec. 10 of art. 1, containing prohibitions upon the powers of the States, and among others, that no State shall enter into any treaty, alliance or confederation; make any thing but gold and silver a legal tender; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or without consent of congress lay any imposts or duties, etc.; and then to the tenth article of the amendments to the Constitution: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people.'

"It will be seen from these clauses of the Constitution, that the States are referred to distinctly in connection with acts of government; that the law-making power of the States is distinctly recognized as existent, by the Constitution of the United States, and certain well defined limitations placed upon its action. Upon sound principles of construction, the States could well have exercised all legislative powers, and so far as the Federal government was concerned, done all things by them deemed proper and not prohibited by the Constitution of the United States, without the provision in article 10 of the amendments. But that article distinctly lays down the principle that 'the powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively or to the people.' It will be seen from these clauses that pre-existing organized governments are recognized, having within their respective territorial limits independent spheres of action, and acting within these, not by virtue of their relation to the Union created by the Federal Constitution, but from their own original author-

ity derived, according to our American ideas of government, from the peoples by whom they were established. Such organized State governments, with all legislative powers not prohibited by the Constitution of the United States, are thus clearly recognized by that instrument. These governments are not in any manner affected in the exercise of their powers by the existence of the Federal Union, except by the grants and prohibitions of the Federal Constitution; and as their existence as State governments is not derived from the Federal Constitution, nor their powers as such from their relation to the Federal Union, or its government, simply certain powers formerly possessed being delegated in the Federal Constitution, leaving the reserved powers to be held as they and the delegated powers previously were—by virtue of the original sovereignty of the States, it is manifest that within its sphere of action we must look to other and different tests as to the validity of the laws of a State than the simple one of connection with the United States.

"In fact, the relation of the State governments to the United States, except in reference to the grants of power to the United States and the prohibitions upon the power of the States, has no bearing whatever upon the question of what powers may be exercised by the State legislatures; nor does such relation, except as indicated, in any way affect or modify the action of the State legislatures in reference to any matters within their spheres of action. We might refer to the series of unquestioned decisions of the Supreme court of the United States, holding that the prohibitions of the amendments to the Constitution—*e. g.*, that no one shall be twice put in jeopardy of life or limb, etc.—have no application to the States, but only to the government of the United States, the States being left to protect their citizens from oppression by the provisions of their own Constitutions. See case of Barron *v.* City of Baltimore, 7 Pet. R., etc. It follows, necessarily, that the fact that the normal relations of the State of Tennessee to the United States were temporarily suspended during the war, could not have had the effect to render void an act of her legislature upon a question in no wise connected with the federal relations, but of purely local interest, the power to legislate upon such questions not being derived from the federal Union or its government, nor prohibited by the federal Constitution." **54**, 699. *Frierson's Ex'rs v. General Assembly Presbyterian Church.* 1872.

This Clause Construed.—NICHOLSON, J.: "This provision was intended to except from the general operation of the Constitution such laws then in force as would expire at some subsequent time prescribed by the Constitution." **56**, 801. [1]*Brinkley v. Bedford.* 1872.

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[1] See same case, art. 7, sec. 5, p. 475; Schedule, sec. 1, clause 1.

CONSTITUTION—WHAT IT SHALL NOT AFFECT.

ART. 11, SEC. 2. Nothing contained in this Constitution shall impair the validity of any debts or contracts, or affect any rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.[1] [Same as Const. 1834, art. 11, sec. 2.]

Construction of Constitution—This Section and Art. 11, Sec. 11, Do Not Conflict—Homestead.—DEADERICK, J.: "In construing statutes, and equally in the construction of the Constitution, the words are presumed to be used in their natural and ordinary sense, and if a technical word is employed, it must be presumed to have been used in its technical signification. Debt, then, can not be regarded as a synonym of tort.

"But the Constitution not only declares that nothing therein shall impair the validity of any debts or contracts, but it adds, or affect any rights of property, or any suits, actions, or rights of action, *or other proceedings in courts of justice.*

"It is argued that to hold that the homestead is not liable in this case, would be to violate that part of this section which says that the rights of action, actions, suits, and other proceedings, shall not be affected, because, it is alleged, while the suit at law was being prosecuted, and the right of action being enforced by legal proceedings, this property was liable for the satisfaction of whatever judgment might be recovered. This provision as to suits, actions, or rights of action, it appears to us, from the context, has reference to the proceedings in court for the enforcement of the right, and was intended to hinder the legislature from obstructing litigants in the prosecution of their suits or actions and as a declaration that nothing in the Constitution was intended to interfere with the regular administration of the law by the courts. Such seems to be the meaning intended by the language, 'any suits, actions, rights of action,' the immediately succeeding language being, 'or *other proceedings in courts of justice.*' This construction removes all seeming conflict between this section and the section securing homesteads to heads of families. . . . This court has held, under the Constitution of the United States, the homestead could not be exempted from sale for *debts* created before the Constitution of 1870 was adopted. But, as before stated, complainant's claim was no debt when this right accrued.

"The language is unmistakably clear, exempting the homesteads from forced sales in all cases but those specified. It was manifestly the intent of the instrument to secure this right of homestead, and to shield it from all liabilities except those mentioned. Cooley Const. Lim., 58,

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[1] See Hazen v. Union Bank, art. 1, sec. 20, p. 183.

says if different parts of the Constitution 'seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. One part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.' The two portions are not really in conflict, as we think the construction placed upon sec. 2, as to suits, actions, etc., is the just interpretation of the language employed, and neither a forced or unnatural construction." 74, 408. *Parker v. Savage et al.* 1880.

ART. 11, SEC. 3. Any amendment or amendments to this Constitution may be proposed in the senate or house of representatives; and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays thereon, and referred to the general assembly then next to be chosen, and shall be published six months previous to the time of making such choice; and if, in the general assembly then next chosen as aforesaid such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner and at such times as the general assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for representatives voting in their favor, such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance to the foregoing provisions, the same shall at each of said sessions be read three times on three several days in each house. The legislature shall not propose amendments to the Constitution oftener than once in six years. (The legislature shall have the right, at any time, by law to submit to the people the question of calling a convention to alter, reform or abolish this Constitution; and when, upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen and the convention shall assemble in such mode and manner as shall be prescribed.)
[Const. 1834, art. 11, sec. 3, was same as above, except that the clause in parenthesis was not in that instrument.]

[Const. 1796, Art. 10, Sec. 3: "That whenever two-thirds of the general assembly shall think it necessary to amend or change this Constitution, they shall recommend to the electors at the next election for the members of the general assembly to vote for or against a convention. And if it shall appear that a majority of all the citizens of the State voting for representatives have voted for a convention, the general assembly shall at their next session call a convention to consist of as many members as there be in the general assembly, to be chosen in the same manner, at the same place, and by the same electors that chose the general assembly, who shall meet within three months after the said election for the purpose of revising, amending, or changing the Constitution."]

DIVORCES.

ART. 11, SEC. 4. The legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law; but such laws shall be general and uniform in their operation throughout the State. [Same as Const. 1834, art. 11, sec. 4.]

Commission Court—Divorce Suits.—COOPER, J.: "The argument is that this provision requires the submission of the subject of divorce to the constitutional courts. We know, however, as matter of history, that the legislature retained to itself the power of declaring a dissolution of the bonds of matrimony long after it had surrendered to the courts all other branches of judicial business, and that the object of this section of the Constitution was to relegate the subject of divorce, like other civil business of a judicial nature, to the 'courts of justice.' Courts of justice are, by the Constitution, authorized to decide all civil cases, as well as to grant divorces. And other civil cases may, notwithstanding, be submitted by consent to the decision of the Commission court. The mere fact, therefore, that constitutional courts are authorized to grant divorces, does not necessarily prevent the legislature from authorizing a special tribunal to grant divorces in cases submitted by the parties." **70**, 178. *Hurt v. Hurt.* 1879.

LOTTERIES.

ART. 11, SEC. 5. The legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State.[1] [Same as Const. 1834, art. 11, sec. 5.]

Grant of a Lottery—Whether a Contract—Vested Rights.—Bass and others made a contract with Erwin and others to open Union street, from College to Market; they were to be compensated out of the proceeds of a lottery, authorized by an Act of 1831, to raise money for that purpose; part of the money had been thus raised when the Constitution of 1834, which prohibited lotteries, was made. In 1836 the legislature passed an act prohibiting all lotteries and to repeal all laws authorizing lotteries. The "trustees" with whom Bass, Green and Elliston had the contract, then refused further to draw the Union-street lottery, so that Bass, Green and Elliston, if they could not have been compelled to draw

[1] There was no clause in the Constitution of 1796 prohibiting lotteries in this State, yet in **10**, 272, CATRON (WHYTE concurring and PECK dissenting) held: "To vend or buy tickets in a private lottery is gaming, within the meaning of our statutes; and in this, as in other offenses inferior to felony, there are no accessories, all concerned in their commission being principals. . . . The Act of 1817, ch. 61, sec. 7, declaring all persons convicted of gaming disqualified to hold office for five years, is constitutional, and it is error in the court, after conviction, not to make such disqualification a part of the judgment, which error it is the duty of the attorney general to correct by appeal." See also McGimpsey and Wife *v.* Booker et al., **13**, 139, decided in 1833; **65**, 480; **81**, 233; and **88**, 553.

it, would have been losers by reason of having opened the street. They, therefore, on the 18th of October, 1838, filed a bill in the Chancery court at Franklin, against Henry Hollingsworth, the mayor of the city, Robert Woods, and John P. Erwin, stating all the above facts, praying that the defendants might be compelled, by a decree of the court, to cause the lottery to be drawn, till out of the proceeds a sum of money might be made, which, when added to the sum already paid the complainants, would be equal to the sum expended by them in opening the street, etc.

REESE, J.: "We will consider the nature of the interest which the defendants had, as the trustees of the Union-street lottery, by virtue of the provisions of the Act of 1831, ch. 69 (private acts), for the purpose of ascertaining whether art. 11, sec. 5, of the reformed Constitution, or the forty-seventh chapter of the Acts of 1834, passed in pursuance thereof, can be held to have legally terminated that interest. So early as 1809, ch. 39, the drawing of a lottery within this State was prohibited by legislative enactment, and by the infliction of severe penalties. By judicial construction upon that act, and the several acts to prevent and punish gaming, all persons concerned in lotteries were held to be guilty of gaming, and to be punished by indictment as for that offense. Lotteries then stood reprobated by legislative enactment and by judicial decision as contrary to public policy and to good morals; and a wise and enlightened public sentiment everywhere sustained the enactment and the decision. Under such circumstances, we ask, what was conferred upon the defendants by the Act of 1831, ch. 69? Nothing, certainly, but an immunity, in that particular instance, and for the specified object, from penalties and indictments; an indulgence granted to them to perform acts which were, in general, held to be against public policy and good morals; a permission to do that for the doing of which all others would have been subjected to fine and imprisonment. If, then, before the defendants had done anything under the Act of 1831, this privilege conceded to them of gaming without liability to criminal prosecution until they had realized a specified amount of profits had been abrogated by a subsequent legislature, and they had been placed upon the same ground with all other citizens, of what could they have complained? Could they have, on just grounds, alleged that a contract had been impaired or a right divested? See 3 Story, secs. 1379, 1385. For this, surely, no one will contend. If, then, they had organized a scheme, and had drawn one or more classes of the lottery, as the bill alleges was done, and, so to speak, one or two games had been played and finished, and the legislature finding a pause in their proceedings, when no purchaser of a scheme and no holder of a ticket could be injuriously affected, and, availing themselves of this pause, had prohibited the further exercise of this extraordinary privilege, could the defendants be heard to object

to the prohibition upon the ground that they had not realized all the profits which they had been promised, and which they expected? Certainly not.

"In the precise state above supposed stood this matter when the convention, in 1834, adopted" (this section). . . . "This was itself a prohibition, and was announced to the complainants before the formation of their contract with the defendants. And again, although that contract is dated before the Act of 1835, ch. 47, yet neither the bill nor the answer alleges that the complainants, before the passage of that act, were at any trouble, made any advances, or incurred any liability whatever. They are, therefore, in no better situation, with regard to the repealing law, than the defendants. If we had taken a different view of both the points above discussed, still we could by no means have decreed a specific execution of the contract, and ordered the drawing of a lottery, which might, under the provisions of the Act of 1835, ch. 47, have subjected hundreds of our citizens—the drawers of the lottery, the vendors of tickets, the parties, publishers, and circulators of the scheme, and even the ticket-holders themselves—to prosecution by indictment."[1]

19, 426. *Bass v. Mayor etc. of Nashville.* 1838.

ART. 11, SEC. 6. The legislature shall have no power to change the names of persons, or to pass acts adopting or legitimating persons, but shall, by general laws, confer this power on the courts.[2]

USURY.

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ART. 11, SEC. 7. (The legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State;) but the legislature may provide for a conventional rate of interest, not to exceed ten per cent per annum.[3]
[Const. 1834, art. 11, sec. 6, contained only the clause in parenthesis.]

Contract for Payment of Interest Not Exceeding Ten Per Cent Per Annum—Not Class Legislation.—JOHN C. GAUT, Sp. J.: "The Constitution imposes no restraint or limit upon the legislature upon the subject of interest, except that it declares that 'the legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the state.' In pursuance of said provision of the Constitution, the legislature, by third section of the Act of 1835, ch. 50, fixed the rate of interest at six per cent per annum, and at that rate for a longer

[1] See **23**, 262.
[2] See Hazen v. Union Bank, art. 1, sec. 20, p. 183.
[3] See **67**, 242, and **68**, 243.

or shorter period. That was equal and uniform throughout the State. The rate of interest is not restrained by the Constitution. The legislature has at all times the power to increase or diminish the rate of interest, in their discretion. They can alter, amend or repeal the law in relation to interest. They are required by the Constitution to fix a rate of interest which shall be equal and uniform throughout the State; and this is the only restraint upon the legislature. The six per cent interest law of 1835 remained unrepealed and unchanged until the Act of the 21st of February, 1860, when the legislature enacted that from and after the 1st day of September, 1860, it should be lawful, whenever any person or persons should contract for the loan of money, for the lender or lenders, his or their assigns or representatives, to contract for a rate of interest, up to the time of payment, not to exceed ten per cent per annum; provided such agreement appears upon the face of the bond, note, bill or such other written instrument. And the second section declares that the rate of interest now established by law shall continue equal and uniform throughout the State, as heretofore; that is, at six per cent, except in cases of money loaned or in the renewal of notes for money loaned, when the parties should be privileged to contract for a rate up to ten per cent by inserting such an agreement in the face of the bond, bill, note or other written instrument.

"We think that the Acts of 1835 and 1860[1] should be so construed together as one act, in reference to the Constitution. The Act of 1860 is not a repeal of the Act of 1835, but an amendment. The second section of the Act of 1860 expressly declares that the rate of interest now established by law shall continue equal and uniform throughout the State, as heretofore; and no greater amount than six per cent shall be paid on any contract or obligation, unless agreed on by the parties according to the provisions of the first section; that is, in any contracts for the loan of money or in the renewal of debts for money actually loaned, it should be lawful for the parties to such contracts to agree upon a rate of interest to be paid, not to exceed ten per cent per annum, until paid, provided such agreement is evidenced by the bond, bill, note or other written instrument. It is an amendment of the Act of 1835, so far as to allow the parties to contract on the loan of money or in the renewal of debts for money actually loaned, to stipulate for and receive a rate of interest not to exceed ten per cent per annum. And the question recurs: Is said amendment in violation of the Constitution? We think not. We believe that six per cent per annum is the fixed, established, uniform rate throughout the State in the absence of a special contract of the parties concerned. And that, by the said Act of 1860, the general law was so amended as to make it lawful, in all cases on the loaning of money, or in the renewal of debts for money actually loaned,

[1] Code 1858, 1944 et seq.; T. & S., 1944 et seq.; M & V., 2701 et seq.

to agree upon any rate of interest to be paid, provided that it did not exceed a rate of ten per cent per annum, and provided such agreement was evidenced in the written contract. And we think said amendment is equal and uniform throughout the State. The right and privilege extended by the Act of 1860 to all persons contracting for the loan of money, or in the renewal of debts for money actually loaned, to contract for a rate of interest not to exceed ten per cent per annum, was equal and uniform throughout the State. . . .

"But it has been insisted in argument that the Act of 1860 is class legislation; that it suspends the general law of the land for the benefit of a class of individuals. We are unable to concur with the counsel in the solidity of the argument. We are unable to see wherein it is class legislation, or that it suspends the general law of the land for the benefit of a class of individuals. The law is equal and uniform throughout the State to all persons, both lenders and borrowers, who could bring themselves within the provisions and supposed benefits of the law—that is to say, to every member of the community in this State who might have money to lend, or loaned out, without regard to his, her or their condition, business, vocation or profession in life. No particular class is to be benefited or favored to the exclusion of any other, but every person in the State may partake of the supposed benefits intended to be conferred by the law. It is equal to all." **42**, 386. *Caruthers Ex'rs v. Andrews.* 1865.

Causes that Gave Rise to this Section.—BURTON, Sp. J.: "Ever since the Act of 1819 the statutory law has been that when money is loaned at more than six per cent, the party could recover the principal and simple interest, and the excess over six per cent alone was usury. This was a radical change of the North Carolina Act of 1741, chapter 11, clause 2, before that time in force, by which contracts whereby more than six pounds in the hundred were taken for the use of money loaned per annum was declared to be utterly void. Notwithstanding the Act of 1819, the legislature had granted to banks and to other moneyed corporations the privilege of taking more than six per cent for the use of money, and these special charters, or rather this privilege granted to them, gave rise to sec. 6, art. 11, of the Constitution of 1834. . . . That the object of this provision was to inhibit the legislature from granting to banking corporations the privilege of taking a greater rate of interest than was allowed to individuals, is manifest from the journals of the convention. The journal of the convention of 1834, p. 161–2." **61**, 176. *Perkins v. Watson, Trustee.* 1872.

Act Authorizing Issuance of Bonds at Higher Rate than Six Per Cent is Void—Borrower and Lender—No Discrimination Between—Uniform Rate of Interest—Special Legislation.—FREEMAN, J.: "The legislature

that met immediately after the adoption of the Constitution of 1834, in pursuance of this requirement of the Constitution, passed the [1]Act of 1835, ch. 50, sec. 3 of which provides that 'the legal rate of interest shall be hereafter, as heretofore, six per cent per annum, and at that rate for a longer or shorter period,' and the same provision substantially is found in the Code, section 1944. . . . In the act before us we have a different rate of interest provided for as to the one hundred thousand dollars in bonds to be issued by the Memphis Overton Hotel Company. Can this act be sustained as equally in pursuance of the same article of the Constitution, or, as authorized by any other provision of the Constitution? This is the question. . . . The provision of the Constitution clearly meant that the legislature should provide by a general law, operative alike upon all, and throughout the entire State, for a uniform and equal rate of interest. Is the act in question conformable to this requirement? It certainly is not—under section 8 of the Bill of Rights, as that section has been uniformly construed by our courts—the law of the land; that is, a general and public law, equally binding, in some aspects of it, upon every member of the community. . . . It is operative only in favor of, or upon, the Memphis Overton Hotel Company, and it authorizes that company to issue its bonds at a rate of interest higher than and different from that prescribed by the general statute of the State, by which the rate of interest is fixed and made uniform and equal throughout the State. No other person, whether natural or artificial, has the right, under this law, to issue paper bearing this rate of interest. It, then, is the grant of a right (whether it is a privilege or not need not be discussed here) to this company to do what it could not do bindingly except under the provisions of this enabling act of the legislature. The very fact that the act of the legislature had to be passed for this purpose settles, we think, conclusively, that it is a law passed in derogation of the general law of the land to enable something to be done that could not be legally done without such an act, so as to effectuate the end desired; that is, the raising of means to complete the hotel then in course of erection. . . .

"While there is no prohibition upon any one to lend to this company, yet practically, and as a matter of fact, only a very small portion of the people of the State could enjoy this privilege; and although that number is not defined or specifically designated by the law, yet it is confined to the lenders of one hundred thousand dollars, and to this corporation alone. It is a special privilege granted to these money-lenders, be they many or few, with the certainty that it must necessarily be limited to and enjoyed by a few of the people of the State. If this be not granting a special privilege to a favored class, practically exclusive of others not of that class, we confess we are unable to see what would be. The

[1] T. & S., 1944; M. & V., 2701.

privilege might have been more definite as to the individuals composing the class, but it could not have been more certain in its operation in favor of a class, and that limited to a comparatively small number of the citizens of the State who should lend to this corporation. We may admit that usury laws, passed for the punishment of the offense of taking more than six per cent interest, inflict penalties only on the lenders; but it was intended by the Constitution not only to restrict lenders, but at the same time to confer affirmatively a privilege on the borrowers. We cannot assent to this view, because it would involve the absurd conclusion that while a man might not lend money at over six per cent or the other uniform rate to be fixed by the legislature, any man has granted him, by implication, a right to borrow at any rate he might choose, or might be able, and that the Convention intended to grant, by implication, the right for one man to give what no man should be authorized to receive. In a word, we cannot see how a man may be said to have the right to be a borrower under the law at more than six per cent interest, when there could by law be no lender at a higher rate. . . .

"The legislature certainly intended, by our usury laws, no grant of a privilege or right to the borrower, and the Constitution most certainly did not intend to require the legislature merely to fix the rate of interest which lenders might take, but at the same time to leave the legislature authority to allow, as a matter of right, by the same law, the borrower to pay a different rate. The legislature under this clause of the Constitution could as well, if it had been deemed best, have inflicted the penalties of usury upon the borrower as on the lender, and no one could have doubted that the law was constitutional and in strict conformity to the letter as well as the spirit of section 6, art. 11, of that instrument, as intended to operate, and as operating, effectually to prevent parties taking more than the rate of interest allowed by law. The true position is, that the convention did not intend to discriminate in favor of the one class as borrowers and against the other class as lenders, by this provision; but only to fix a uniform rate for both. And that body never once conceived the idea that there could be a borrower authorized by law to borrow, without a lender authorized to lend on the same terms. The object of the convention was to fix the rate of interest at one uniform standard, and that that rate should be, when paid by the borrower, the precise sum which the lender was entitled by law to receive.

"We need not further notice the fallacy that lies under the proposition that borrowers had a legal right to borrow at ten per cent, but lenders had not the right to lend at ten per cent: but we propose for a moment to test the argument drawn from the proposition that this statute only exempted the lenders from the penalties of usury. If so, it is then a law passed for the special benefit of lenders of money to this

corporation. Then it is in the very teeth of the prohibition of sec. 7 of art. 11. . . . Here, then, is a suspension of a general law for the benefit of individuals, and a law passed for the benefit of individuals, inconsistent with the general laws of the land. These individuals are, on the theory of the argument, the capitalists who may lend their money to the Memphis Overton Hotel Company, and not all who may ever desire to do so, but only the few who shall lend the sum of one hundred thousand dollars on the particular bonds authorized by this single act. If this is not prohibited by this clause of the Constitution, then what law is? If this law can be sustained on this ground, why may not any individual liquor dealer in Tennessee be allowed to tipple without a license, by special law? Why may not the leading faro dealers of the State, to the exclusion of smaller dealers, be allowed, by special law, to deal faro, in violation of the general law of the land, under the specious guise of relieving penalties imposed by the general statute? And so on. Why may not anything be authorized to any particular class, however violative of sound morals or the general law of the land? We can not assent to the correctness of reasoning that leads to these results." **59**, 107. *McKinney v. Memphis Overton Hotel Co.* 1873.

Building and Loan Association — Contract Not Usurious. — COOPER, J., held: "A contract between a building and loan association, organized under the Act of 1875, ch. 142, secs. 5 and 14 (M. & V., 1742, *et seq.*), and one of its members, by which the association advances money to the member upon the anticipated value of his stock when the accumulations shall bring all the stock to par, upon a premium bid by the member in open competition for the fund, and the member agrees to continue to pay his monthly dues on the stock, and to pay in addition monthly installments on the whole amount bid for, equivalent to interest at the rate of six per cent per annum until the assets of the association reach the par value of the stock, and secures his compliance with these terms by a note for the amount bid off and a deed of trust on realty, is not usurious." COOKE, J., dissented. **82**, 677. *Patterson v. Workingmen's B. & L. Ass'n.* 1885.

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ART. 11, SEC. 8. The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. [Above same as Const. 1834, art. 11, sec. 7.] No corporation shall be created, or its powers increased or diminished by special laws, but the general assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may at any time be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested.

[In place of the last sentence of this section the Constitution of 1834, art. 11, sec. 7, had the following proviso after the first sentence: "Provided, always, the legislature shall have power to grant such charters of corporation they may deem expedient for the public good."[1]]

Partial Laws.

Act Creating County Judge for Certain Counties. — By the Act of February 18th, 1858, ch. 38, the office of county judge was established for the counties of Davidson, Shelby, Knox, Montgomery and Wilson.

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[1] In the case of Mayor etc. of Morristown *v.* Shelton, (**38**, 24), decided in 1858, CARUTHERS, J., held: "The acts of 1849, ch. 17, authorizing the County courts, upon certain conditions, to create town corporations, is a valid and constitutional enactment."
See also **69**, 118; **75**, 164; **81**, 403; **87**, 157; **78**, 496; **83**, 209, 215; **91**, 570.

In the case of Burton *v.* School Commissioners (**19**, 590), decided in 1838, TURLEY, J., said: "In the year 1826 the legislature of this State passed an act to prevent the depreciation of Nashville Bank paper, by which provision was made that the notes of the Nashville Bank and its branches should

By an act of the same session, ch. 90, passed March 20, 1858, "exclusive original jurisdiction of all criminal offenses under the grade of petit larceny, committed in the county of Knox, was conferred upon the County court." CARUTHERS, J.: "It is contended that the Act of February, 1858, violates the seventh section of article 11 of the Constitution, against partial legislation, as it is limited to a few counties, and has not a general and equal application to the whole State. We think the act is not obnoxious to this objection. The policy of marring the uniformity and symmetry of a general system, by the establishment of these local courts, may well be questioned, but that the power to do so abides in the legislature, we can not doubt. They have exercised it in establishing a Criminal as well as Common Law and Chancery court at Memphis; at Nashville, a Criminal court; a Common Law court in Chattanooga, and perhaps in other instances. The constitutionality of these acts has never, as we are aware, been questioned, although they have exercised jurisdiction of the lives and fortunes of individuals. Such acts are not partial in the sense of the clause referred to. The office created is open to all the cities equally, in the prescribed limits, and the jurisdiction conferred operates on all alike, who may fall within its range. That provision, it is presumed, only has reference to acts conferring privileges and benefits, affecting rights, or imposing penalties. It is with the legislature to determine how many and what kind of courts are required, for the administration of justice, and what shall be the character and limits of the jurisdiction of each. They may likewise christen the presiding officer with any name or title they may consider most appropriate. They might have denominated the officer in question a chairman, a chief squire, a president or presiding officer, as well as a judge. This could not affect the validity of the act by which he was brought into existence, or the extent of his jurisdiction." **37**, 513. *Moore v. The State.* 1858.

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be received at par by the State in payment of debts due from purchasers of Hiwassee and Academy lands, and also in payment of one-half of any debt due to the Bank of the State of Tennessee. This statute makes it the express duty of the directors of the Bank of the State of Tennessee to loan out said money, as fast as it might be received, for the shortest time and upon the best terms practicable, to be repaid in sound or par funds. Session Acts of 1826. Under the provision of this statute the plaintiff in error, Burton, who was a debtor to the Nashville Bank, borrowed the sum now sued for in Nashville Bank paper, and with it paid his debt to the Nashville Bank; and he now asks to be protected against the payment of the principal sum thus borrowed upon the ground that, at the time the transaction took place, Nashville Bank paper was greatly depreciated, and the contract therefore usurious. It may be observed that this application comes with a bad grace. A debt has been contracted with the Nashville Bank when its paper was at par, and this debt was discharged by the money borrowed from the Bank of the State at par, and no loss whatever was sustained by the transaction. Nothing, then, but strict law would justify us in reversing the judgment of the court below. This, it is said, is to be found in the decision of this court in the cases of the Nashville Bank *v.* Hays and Grundy & Lawrence *v.* Morrison, 1 Yer., 243, 444; these cases determine that a loan of paper money greatly depreciated to be repaid in sound funds is usurious. Without questioning the authority of these cases we do not think them applicable to the one now under consideration. The Act of 1826, as we have seen, authorized and required the directors of the Bank of the State to loan our Nashville Bank paper to be repaid in par funds, when it could be done. The legislature certainly had the power to pass this law, and it clearly makes that lawful which otherwise might have been unlawful under the decisions before referred to. It would involve an absurdity to say that the legislature had required the directors of the State Bank to perpetrate a crime, for which they might be indicted, and this would be the consequences of a decision pronouncing a loan of Nashville Bank paper, under the provisions of the Act of 1826, usurious. We are therefore of the opinion that the contract is legal, and that the plaintiffs in error have no cause of complaint against the judgment of the Circuit court, which must be affirmed."

Reporter's Query: Whether the Constitution of 1834 left this power to the legislature.

Act Affecting Right to Sue and Recover Personal Property—Laws, Retrospective, General, and Partial—Remedy.—McKINNEY, J.: "It is insisted that the complainant's right to recover the slaves is barred by the Act of 1855–56, ch. 112, sec. 8, which declares 'that the title of all persons to any slave, or slaves, sold under proceedings of the Circuit, Chancery, or County court under the Act of 1827, and to which the heirs, distributees, or legatees were not made parties, shall be forever barred, unless suit to recover said slave, or slaves, shall be instituted within six months after the passage of this act.' We feel constrained to declare this extraordinary enactment to be unconstitutional and void. There is much plausibility in the argument, that it violates the spirit of both the eighth and twentieth sections of art. 1, inasmuch as it attempts to deprive certain persons of their property contrary to 'the law of the land,' and is also a 'retrospective law.' But, perhaps, it is a still more palpable infringment of the provisions of sec. 7, art. 11. . . .

"Can a more direct violation of the true spirit and meaning of these fundamental provisions be imagined than is presented by the section of the act above cited? We think not. What does it propose? In some instances, prior to the passage of this act, sales had been made of slaves, under color of judicial proceedings, professing to have been founded upon the Act of 1827, but which were, in fact, wholly contrary to law and void, communicating no title to the purchaser, and divesting no title out of the former owner. By the general law of the land, as it existed at the time of these illegal sales, the persons who had thus been deprived of their property contrary to law had the unquestionable right to bring suit for its recovery at any time within three years after the sale. And if the owner happened to be an infant, or under other legal disability, his right of action was saved for the period of three years after the disability ceased to exist.

"Now, as a sort of 'relief measure,' in cases of such irregular and void sales as had been previously made, it is attempted by the Act of 1856, in the very teeth of the Constitution, 'to suspend a general law for the benefit of (these) particular individual' purchasers; or, in other words, 'to pass a law for the benefit of individuals inconsistent with the general law of the land.' The act, it will be observed, does not contemplate any change of the existing 'general law' in the future. It does not provide that in all similar cases of irregular sales of slaves which may be made after its passage suits shall be brought within six months, instead of three years. It is altogether retrospective in its operation, referring only to past cases, and having no reference whatever to the future. In short, its whole scope and object is simply to exempt 'particular individuals' or special cases from the operation of 'the general law of the land,' or 'to suspend the general law' in their favor. This conclusion, it seems to us, is so obvious that argument is

scarcely necessary to make it clearer. There is no force in the argument that the act affects only the remedy, and not the right. The remedy is sometimes so incorporated with the right that it would be extremely difficult, if not impossible, to maintain, in any proper sense, that the former can be impaired without affecting the latter. But this is a point we need not stop to discuss, as it is clear beyond all doubt that the prohibitions of the Constitution, in letter and spirit, apply as much to remedies as to rights. It was thought proper and necessary that the rules regulating the remedy should be equal and uniform in their operation as well as those regulating the rights of the citizens. And surely this is correct; for if the remedy may be frittered away, what is the right worth?

"The act is likewise subject to the objection, as has been argued, of being a partial law. It does not profess to be applicable to all illegal sales of slave property, but only to judicial sales, under a particular statute; and not even to all irregular sales under that statute, but only to the special case where 'the heir, distributees, or legatees were not made parties.' The act seems not to contemplate or provide for other irregularities in proceedings, under the Act of 1827, which might avoid a sale; nor does it apply to an illegal sale of slaves by the sheriff under the ordinary process of *fieri facias*. If the act had been merely prospective, so as only to operate on sales to be made after its passage, whatever might be thought of its unreasonable severity and injustice in extending indiscriminately to all persons, regardless of the rights of those laboring under legal disabilities, still, so far as regards the question of constitutional power, it might, perhaps, be sustained. But being of the character already stated, it is impossible to support it without yielding to the legislature the exercise of a power expressly denied by the Constitution." 39, 282. *Morgan et al. v. Reed et al.* 1858.

Act Extending Further Time to Tax Collector Releases Sureties.—NICHOLSON, J.: "Complainants are sureties of David Fry as tax collector for Greene county. On the 26th of April, 1866, the legislature passed an act allowing Fry the further time of six months to collect and account for the taxes. The question raised by the bill is, does this extension of time to the tax collector release his sureties? . . . The legislature had protected the principal debtor from suit by forbidding the comptroller and attorney general and circuit judge to enforce collection by suit. It is conceded by the attorney general that this prohibition is binding on the officers of the State. The State operates alone through its officers. If their hands are tied by a valid legislative act, we are unable to understand how the sureties are to proceed to sue and collect by suit from their principal debtor a debt which the State has forbidden her own officers to collect from him by suit. We understand that on the subject of revenue the sovereignty of the State is repre-

sented by the legislatutre, and a legislative act is passed which forbids the officers of the State to sue the debtor of the State. This operates necessarily to protect the debtor from suit, as well by the sureties as by the officers of the State. It is true the State, through the legislature, may repeal the act of indulgence, but until such repeal it is binding, and the State is incapable of enforcing the debt, except through the repeal of the act by the legislature. Until such repeal the suspension of the right to sue is complete, and the sureties can have no remedy, either against the State or the principal debtor. It follows that the legislative indulgence given to Fry, as it was not repealed, operated to discharge his sureties." Judge McFARLAND dissented. **55**, 433. *Johnson et al. v. Hocker, Atty. Gen'l. et al.* 1874.

Lien of Cotton Broker.—NICHOLSON, J., held: "The [1]Act of 1867–8, ch. 35 (T. & S. Stat., sec. 1993*d*) giving cotton brokers, etc., a special lien for five days upon cotton sold by them, is not within the constitutional prohibition of special or partial legislation." **59**, 633. *Parks v. Parks.* 1874.

Banks—Distribution of Effects—Statute Limiting Time Partial and Void—Delegation of Power.—TURNEY, J.: "The Act of December 12, 1866, entitled, 'An Act to expedite the distribution of the effects of banks which have made or may make assignments among their creditors,' is not a statute of limitations. . . . To be a valid law a statute of limitations must be fixed and arbitrary, applying equally to all the people of the State or to all of a class, defining the outside or remotest period of time to which it is directed, and not merely fixing a minimum under which it shall not operate. This statute makes the trustee both legislator and judge. To him it is given to prescribe the time within which the creditor shall file or deposit his claim, and to him it is given to determine whether he has brought himself within the time, creating branches to the legislative and judicial departments unknown to the Constitution. The act is an attempt on the part of the legislature to delegate its law-making power to individuals, and is prohibited by the Constitution, of which the legislature is the creature. It is as competent for the legislature to enact that each court in the State shall declare what time shall bar the collection of a debt after a given period, as it was to have enacted this statute. To do either is to create as many new legislatures, with limited powers, as there are trustees or courts. The statute is unconstitutional and void." **60**, 436. *Fogg et al. v. Union Bank et al.* 1872.

Act Applying to Counties Only That Have a Certain Population, Void —Act 1877, Ch. 120.—COOKE, J., held: "Chapter 120 of the Acts of 1877, providing that it shall apply 'only to counties that had a popula-

[1] M. & V., 2761.

tion by the census of 1870 of not less than forty thousand,' is unconstitutional—there being but two counties in Tennessee having that population—because it is a suspension of the general law for the benefit of the two counties, and because it is impossible for other counties, which have subsequently acquired a population of forty thousand, to bring themselves within the terms of the statute." 82, 520. *Woodard Adm'r v. Brien et al.* 1884.

Act of 1885, Ch. 158, Void for Same Reasons Given in Foregoing Case—Statute—Part Void—Effect on Residue.—COOKE, J., held: "The Act of 1885, ch. 158, which by its terms 'shall not apply to counties having a population of not less than seventy-five thousand inhabitants,' etc., is partial or class legislation, and therefore void. Where only a part of a statute is void, and the residue so dependent and connected with the void part that it can not be presumed that the legislature would have passed the one without the other, then both are void." 84, 71. *Burkholtz v. The State.* 1885.

Barber Sunday Law Class Legislation.—The Act of 1887, ch. 106, was considered in this case. TURNEY, J.: "This act, if operative, is for the benefit of all individuals (barbers excepted) who may see fit to keep and use bath rooms for profit. We know that all best hotels have bath rooms for the use of guests; that they receive pay for baths and permit them on Sunday; that in many cases a barber has his shop and bath rooms under the roof and in parts of the building in which the hotel and its bath rooms are kept, occupied and used. So if the act is to be enforced as the law it will apply alone to barbers with its penalties and punishments, while the inn keeper may with impunity use and keep open his bath rooms on the same floor and equally public. Under the act every other individual than one engaged in barbering may establish and keep open on Sunday any number of bath rooms, and may even buy or rent that now used by the proscribed barber, in or out of a hotel building, continue its use as a bath room and keep it open as such on Sunday. The act falls strictly within the ordinance in its tacit but distinct and unequivocal reservation of rights, privileges, immunities and exceptions to all classes of individuals except those 'engaged in the business of barbering.' For this, as well as upon the first ground, it is void." 86, 276. [1]*Ragio v. The State.* 1887.

Druggists' Relief Act of 1887—Retrospective Laws—Assumption of Judicial Power by Legislature—Power to Compromise Law Suits—Obligation of Contracts—Questions Reserved—Privileges and Property Tax.—The question here was the validity of the Act of 1887, ch. 89, p. 179, releasing all druggists from liquor dealers' privilege taxes incurred by them under the Acts of 1881 to 1886, inclusive, where the liquors were

[1] See same case, art. 2, sec. 17, p. 248.

sold in good faith for medicinal uses only, also where suits were pending at date of passage to dismiss same at defendants' costs. It was insisted that this act was in violation of the Constitution, art. 11, sec. 8; art. 1, sec. 20; art. 2, sec. 28; art. 2, secs. 1 and 2. Prior to the passage of this act the State and Davidson county had recovered a decree in the Supreme court against complainants for these taxes.

LURTON, J.: "The class thus described by the act form a natural and not an arbitrary class, and legislation with regard to this class is not for the benefit of individuals within the meaning of the Constitution. But it is said that the act makes no provision for the return of the tax to such as have paid it, and that it is therefore partial. This might be dismissed with the suggestion that it does not appear that there are any such. But would this be an objection to such an act? This liability, after it was incurred, became a debt due the State, and the relation of debtor and creditor existed. Can the State release or compromise with its debtors? Resolutions and acts releasing bail bond for forfeitures and compromising or releasing sureties upon the bonds of revenue and other officers are not uncommon, and their validity has been unquestioned. That the power to settle, compromise, and even release a liability due to the State ought to exist somewhere is most obvious. . . . He who would show the unconstitutionality of an act of the legislature must be able to put his finger upon the provision of the Constitution violated. That the power of compromising or releasing a liability may be abused is no answer to its existence. All human power is liable to abuse. The power of public opinion, the responsibility of legislators to their constituents, are likely to prevent any very great abuse of such power, and afford reasonable guaranties for its proper exercise. There is no clause of the Constitution which prohibits the legislature from releasing any of its debtors, and, indeed, the learned counsel representing the State do not challenge its existence with regard to individual debtors. But they insist that its exercise must be restrained by the limitations contained in the Constitution requiring all legislation to be general. This argument, if sound, might require the State, if it released one debtor, to release all in a similar situation. This is not reasonable, for it is conceded that the State may compromise with or release a single debtor without extending the same terms to other debtors on the same account. Now, if the State may, by resolution or bill, compromise with or release one debtor, or the sureties upon a particular bond, why may it not include, in the same release, any number of debtors? If such an act or resolution would be valid if the debtors relieved were named, why will it not be equally valid if those to whom relief is extended are by the act so described as to constitute a class? We can see none. That the release is conditional upon the existence of certain facts, or upon acceptance of certain terms, such as are named in the

second section of this act where suit has been brought, is not at all objectionable. The second section is operative only upon the collecting officers of the State, and requires *them* to dismiss suits pending upon acceptance of the terms of the act by the defendants. It contained no mandate to the courts. . . .

"The refunding of a property tax to the people of one county would probably operate as unequal taxation. That case is in no aspect controlling as to the question now under consideration, for if the validity of an act releasing certain tax payers who have incurred liability for a privilege tax depends upon its applicability to all members of the community in a like situation—a question which we reserve—then the requirement is met in this case, for druggists selling liquors for medicinal purposes only form a natural and not an arbitrary class, wholly distinct from liquor dealers in any true or legal sense of the term. The act is therefore not one for the benefit of individuals within the meaning of the Constitution. That the act applies alone to past delinquencies, and has no prospective effect, does not make it retrospective legislation in the sense of the Constitution. All release acts or resolutions settling, compromising, or releasing liabilities due to the State are in one sense retrospective; but there can be no doubt that a State may pass such retroactive laws as only waive her own right without violating the Constitution. Black's Constitutional Prohibitions, sec. 221; Davis *v.* Dawes, 4 Watts & S., 401; Lewis *v.* Turner, 40 Georgia, 416; Myers *v.* Byrne, 19 Ark., 308.

"That such a release act may have been unwise furnishes no reason for declaring it void. The policy of such legislation may be debatable, but the legislature must settle all such questions under their responsibility to their constituents. The question as to this court is one of legislative power. If this existed the act must stand. The operation of the act is obviously to release *all* who have made themselves liable by sales for medicinal uses. It does not, therefore, matter whether the liability has been reduced to judgment before the passage of the act, or is still the subject of a pending suit. If the party liable chooses to rely upon the release, he may do so by injunction bill, as in this case, or by pleading it and offering to comply with the terms of the second section when suit was pending at the passage of the act.

"Does the act release the liability of complainant to Davidson county for this privilege tax? We think it does. The liability was incurred to both State and county under the same law and upon the same state of facts. The act releases the class of citizens described in the act from *all* liability incurred during certain years. The terms are comprehensive enough to embrace liability to the county as well as the State. The State may release a liability to the county for such a tax as well as it may release liability to itself. The county is but an emanation from

the State. It does not exercise any power or franchise under any contract between itself and the State. The latter creates, and it may destroy. The State delegates the power of taxation, but it may withdraw such power and itself assess taxes for municipal purposes." **87**, 218. *DeMoville & Co. v. Davidson County.* 1889.

Railroads — Unfenced — Liability for Injuries Done Live Stock — Act 1891, Chapter 101, Constitutional — Appraisement of Damages — Attorney's Fees — Jury — Police Power — Construction of Doubtful Statute.—LURTON, J., held: "The [1]Act of 1891, ch. 101, fixing upon unfenced railroads absolute liability for injuries done to live stock by their moving trains, is constitutional and valid, both as a whole and in its details, when its scope and pupose are ascertained by a correct construction. This act should not be treated as a mere scheme for the speedy collection of damages for injuries to live stock, although that is incidentally provided for. Its chief purpose is to prevent accidents on railroads, and, viewed from this higher ground, it is a proper and legitimate exercise of the police power of the State. And said act is not unconstitutional as vicious 'class legislation,' although its provisions confer benefits upon a limited class — to wit, owners of live stock — and impose burdens upon a limited class — to wit, unfenced railroads. These classes are natural and not arbitrary. And that provision of said act is valid which authorizes the appraisement of the damages done to live stock by three freeholders appointed by a justice of the peace at the instance of the owner, and makes their report *prima facie* evidence of the *value* of the stock injured or killed. This is a mere regulation as to evidence, which it was competent for the legislature to make. And that provision of said act is valid which makes railroads wrongfully refusing to pay such appraisement liable for plaintiff's attorney fee, in addition to other damages, in any suit brought to recover the damages withheld. This is not obnoxious class legislation. It is an exercise of the police power of the State. But no fee is recoverable unless the appraisement is sustained. But the amount of such attorney fee must, like other damages, be fixed by the jury or the court sitting as a jury. The provision of said act requiring the fee to 'be fixed by the court trying the case' is construed as providing for jury trial of this question, thereby saving the act from unconstitutionality. Doctrine reaffirmed and illustrated that where a statute is of doubtful meaning, it should receive that construction which is in harmony with the Constitution." **91**, 489. [2]*Railroads v. Crider et al.* 1892.

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[1] Shan. Sup. to M. & V., p. 116. See **115** U. S., 523. [2] See same case, art. 2, sec. 17, p. 294.

Private Corporations — Creation and Control Of.

Legislature Has Power to Reserve Right to Repeal or Amend Charter — Vested Rights — Contract. — CARUTHERS, J.: "In England, corporations are created by royal charter and by the act of parliament. They may also exist by prescription there, which presupposes a creation in a lawful mode — that is, in that country, by charter from the king, or act of parliament. In this country they can only be created by the authority of the legislature. 2 Kent, 276. . . . The legislature may reserve the power to modify, amend, or repeal a charter. 2 Kent, 306; Ang. & Ames, ch. 22, sec. 737. This reservation, then, becomes a part of the contract, and the charter is accepted with that as one of its terms or provisions. This exercise, therefore, of this power to amend or repeal is no infraction of the contract in such a case, but is in exact conformity to it. The right of the legislature to insert this term in charters is not debatable at this day. Vested rights must be strongly maintained by the courts against the legislatures and all other authorities. The safety of every man's rights, of all kinds, depends upon a firm adherence to this principle, and the least departure from it would be just cause of alarm. But what are the rights of men or corporations, and the rules of construing their contracts, must also be regulated by the rules of law. A contract of any kind with various provisions must be taken as a whole, and all its terms are to have equal vigor according to the meaning and intent of the parties. But in order to reserve to the legislature this important power to repeal, impair, or alter the rights and privileges conferred by a charter, which is considered a compact between the government and the individual corporators, such reservation must be made a part and parcel of the contract — that is, it must be contained in the act constituting the charter — or it is of no force; such reservation is efficacious, contained in the same act with the charter, and not otherwise. 2 Kent, 306, 307.

"In the unreported case of Hurt *v.* Lebanon & Nashville Turnpike Company, decided by this court several terms since — perhaps in 1850 or 1851 — this was settled. An amendment of the charter in that case had been passed, and at a subsequent session repealed. The company resisted the force of the repealing act upon the ground that it was unconstitutional, on the principle established in the Dartmouth College case. The court so held, although at the same session of the amended charter a general clause was inserted in another and distinct act, reserving to the legislature the power to amend or repeal all charters granted at that session. But, not being a part of the amended charter, it was held not to apply to it. If this were not so, no one could safely deal upon the faith of charters, without exploring and fully understanding the whole legislation of the session, at least. But upon the principle

settled there is no danger, as the whole compact must be contained in the same act, plainly open to the inspection of all persons concerned." **35**, 620. [1]*Ferguson v. Miners and Manufacturers' Bank.* 1856.

Charters of Private Corporations May be Amended.— LURTON, J., held: "Charters issued under the General Incorporation Act of 1875 may be amended by general laws adding to the powers therein originally granted. Such amendments are authorized by the Constitution. It is not material whether the power to make them was reserved in the original [2]act." **92**, 168. *Miller v. Insurance Co.* 1893.

Chancery Court Can Not Create Corporations in the Absence of Legislative Authority—General and Special Laws—Reasons for Provisions in This Section of the Constitution.—This case grew out of the refusal of Chancellor Cooper to grant the prayer of the petition of Chadwell and other citizens for a charter of the "Beersheba Springs Company," under the Act of January 30, 1871, T. & S., 1507*i*. NICHOLSON, J.: "Does the Constitution of 1870, art. 11, sec. 8, either expressly or by necessary implication, authorize the legislature to vest in the courts the power to create as well as to organize corporations? It is a matter of legislative and judicial history that sec. 8 of art. 11 of the Constitution of 1834 was intended to operate as a check upon that species of private legislation which conferred special privileges and benefits on individuals which were not enjoyed by all citizens of the State. It is equally a matter of history that the object of the Constitution was, in a great measure, defeated and frustrated by the liberal exercise by the legislature of the power to grant charters of incorporation conferred by the *proviso* to that section. When the convention of 1870 assembled, one of the evils which was pointed out by public sentiment as calling for correction was the unrestricted exercise by the legislature of the power to create corporations. The remedy for this evil was furnished in the clause of sec. 8, art. 11, referred to, which was manifestly intended to apply to corporations that might thereafter be created, the rule of equity and uniformity of rights and privileges, which constitute the true meaning and spirit of the preceding portion of that section. Does the language of the clause, when fairly interpreted, carry out this rule and make the several clauses of the section harmonize in spirit and in purpose?

"The clause commences: 'No corporation shall be created, or its powers increased or diminished, by special laws.' This is an express prohibition against the granting of charters of incorporation by the enactment of special laws, and clearly takes from the legislature the power to enact a special law creating a single corporation. But it was not thereby intended that no more corporations should be thereafter

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[1] See same case, art. 2, sec. 2, p. 252; art. 2, sec. 18, p. 297; art. 2, sec. 21, p. 302.

[2] See Acts 1889, ch. 224, p. 445; Shan. Sup. to M. & V., sec. 1806, p. 174.

created, but they were not to be created by special law. How then were they to be created? The clause proceeds: 'But the general assembly shall provide, by general laws, for organization of all corporations hereafter created,' etc. This language contemplates two distinct processes in order that a corporation may commence operations. First, it must be created, that is, the authority to exist as a corporation must be communicated; and, second, after this authority is communicated the corporation must be organized, that is, must be recognized by competent authority as having complied with the terms of its creation.

"It is clear that the general assembly is to provide the general laws under which the organization is to take place; but it is not required that the general assembly shall organize—that may be devolved upon the courts or any other designated branch of the government. Before organization there must be creation. Until there is a capacity to exist as a corporation, there can be no organization as a corporation. This capacity can only be created or communicated by the general assembly, unless, by special authority of the Constitution, the general assembly may devolve it on some other agency. No such special authority is given by the Constitution, and no powers, except by general laws, to provide for organizing these corporations thereafter created, that is, those corporations which the general assembly may arrange to bring into being by the enactment of general laws prescribing the terms, forms, privileges, liabilities, etc., to attach to them. Such corporation so created shall be organized under general laws for that purpose.

"What the convention intended by the language, 'the general assembly shall provide by general laws for the organization of all corporations hereafter created,' is clearly illustrated by the Act of 1849, ch. 17, entitled 'An Act for the incorporation of the citizens of any town, city, or village in the State of Tennessee, who may claim it.' . . .

"The constitutionality of the Act of 1849, ch. 17, was tested in the case of Mayor and Aldermen of Morristown *v.* Shelton,[1] in which case this court held that the act was clearly constitutional. The same policy which induced the legislature, in 1849, to provide for the incorporation and organization of all villages, towns and cities that might desire incorporation, induced the convention, in 1870, to extend the policy to all corporations, and to take from the legislature all the power to create corporations, except under general laws for their organization and creation. To suppose that the convention intended to confer upon the legislature the power to authorize the courts to create as well as to organize corporations, would be to attribute to them the folly of authorizing the existence, in every county of the State, of a tribunal empowered to create just as many and such corporations as each tribunal might

[1] The opinion in this case is omitted from this volume because the act then under consideration is now obsolete. See note, p. 516.

determine to be proper, thus increasing an hundred fold the evil intended to be corrected. Nor do we see, in the language employed by the convention, either any uncertainty or ambiguity of meaning, especially when interpreted in the light of the judicial and legislative history of the State.

"The language is imperative, requiring the legislature to pass general laws, under which all corporations should be organized. The Act of January 30, 1871, entitled 'An Act to authorize the Chancery courts in this State to grant letters of incorporation,' was intended to carry out the requirements of the Constitution. Provisions are made by this act, under which corporations, for various purposes therein specified, may be organized by application to the Chancery courts. As to these corporations, the objects of the constitutional requirements are sufficiently accomplished and provided for. The objection to the act is confined to those provisions in which the legislature has assumed that power could be conferred on the Chancery courts to organize other corporations than those originated and specially provided for. The constitutional power of the legislature to devolve upon the Chancery courts jurisdiction to create corporations, under the Act of July 30, 1871, was considered by the Supreme court at the September term, 1872, at Knoxville, in the case of C. W. Hall *et al. v.* J. A. Mabry.[1] It was a petition by Hall and others to have amendments made to a macadamized turnpike charter, granted in 1866. The petition was demurred to, upon the ground that the general assembly has no power to delegate authority to the Chancery courts to grant charters of incorporation, or to amend charters of incorporated companies, as prayed for. The court held that the Constitution explicitly prohibits the legislature from creating a corporation by any special law, and as clearly directs that it shall provide, by general laws, for the organization of all corporations to be thereafter created. And it was further held that provision has been made, by the general law of January 30, 1871, for organization of corporations by the Chancery courts. 'This law,' says the court, 'is a general one, extending to every case in which an application may or can be made for corporate privileges.' By this language we understand the court to hold that the law referred to confers upon the Chancery court no powers, in any case, to create a corporation, but that in every case in which provision is made by general laws for the creation of corporations, this act authorizes the Chancery court to organize them by granting charters in pursuance of the general law. Hence, the court say, in conclusion, 'We are, therefore, of opinion that the Chancery court has power, under the Act of January 30, 1871, to organize corporations for the construction of macadamized, graded turnpikes, and plank roads,' these roads being specifically provided for in sec. 2 of the Act of January 30, 1871. But we find

[1] Unreported.

no general law, either in the Code or in subsequent acts, which provides for the creation of corporations for carrying on hotels, with the specific privileges to be exercised laid down. No such provision for the creation of such corporations have been made by general law. It follows, that none such can be organized by the Chancery courts until some general law providing for such corporations shall be enacted."[1] 62, 98. [2]*Chadwell et al. ex parte.* 1873.

Privileges, Immunities and Exemptions—Of Railroad Corporations.

Object and History of This Provision—Legislative Power—Power to Grant Charters With Exemption From Taxation—Internal Improvements. —McFarland, J.: "It has been settled since the Dartmouth College case that the charter of a private corporation, when accepted, becomes a contract, which can not afterwards be impaired by legislative action when the power to do so is not reserved. Stipulations for exemption from taxation, or the payment of a bonus in lieu of taxation, are important elements of the contract, and are protected by sec. 10 of art. 1 of the Constitution of the United States and a similar provision in the Constitution of the State. That the legislature of a State has the power to bind the State by such contracts, where that power is not denied by the Constitution, is also a result of these authorities. . . . Does the power to grant charters of incorporation, with exemptions from taxation or other like stipulations binding upon the State, so that the charter after acceptance becomes a contract and irrepealable, fall properly under the head of legislative power? That such power properly belongs to the legislative department of a State, when there is no special limitation of the power, is too well settled to be questioned. The decisions of the Supreme court of the United States are numerous and uniform, beginning with the Dartmouth College case and coming down to the present time. Pacific Railroad *v.* McGuire, 20 Wall.; Wilmington Railroad *v.* Reid, Sheriff, 13 Wall.; Humphrey *v.* Pegues, 16 Wall., 1 Black, 436. It being, therefore, properly legislative power, it exists inherently, and we must look to the Constitution to see if any limit or restriction is placed upon the power of the legislature in this regard. And, to understand properly the language of the Constitution of 1834 on this subject, we must bear in mind the terms of the previous Constitution, the powers that had been exercised thereunder, the changes made and the evils to be remedied, at the same time considering the different parts of the Constitution bearing upon the question.

"The Constitution of 1796 was especially defective in regard to securing equality of taxation, or the taxation of property according to

[1] Since this opinion was rendered, the laws providing for the organization of corporations have been entirely changed. See M. & V., 1691 to 2004.

[2] See Tenn. Ch'cy Rep., vol. 1, p. 95, this case: M. Burns ex parte, p. 83: also 79, 5.

its value; and this was the evil intended to be remedied by the change made and embodied in sec. 28 of art. 2, in regard to the taxation of property according to its value and securing the equality of taxation. But is there anything in the first clause of this section intended to limit the power of the legislature to grant exemptions from taxation in charters of incorporation, or (which is the same) to stipulate for a bonus or fixed sum in lieu of taxation? The language is: 'All lands liable to taxation held by deed or entry, town lots, bank stock, etc., and such other property as the legislature may, from time to time, deem expedient, *shall be taxable.*' Was this intended to mean that thereafter the legislature should not have the power to stipulate for total or partial exemptions from taxation in charters of incorporation? The convention of 1834 comprised among its delegates some of the ablest lawyers the State has ever produced. That they were familiar with the principles of the Dartmouth College case, decided some fifteen years previously and followed in other cases, can not be doubted. It is apparent, also, that they were familiar with the fact that the legislature, under the previous Constitution, had exercised the power of granting charters with total or partial exemption, or contracting for a special bonus in lieu of taxation —notably, in the instance of the charter of the Union Bank, granted only two years before—Union Bank *v.* The State—and that the power had never been questioned. With these facts prominent before the convention, if it was their purpose to restrict this power of the legislature, we should expect to find such restriction expressed in unequivocal language. But the only direct provision in regard to the power of the legislature in respect to charters of incorporation is the proviso to sec. 7 of art. 11, to the effect that the restriction upon the power of the legislature to grant special privileges, immunities and exemptions was not to be construed to affect the power of the legislature to grant such charters of incorporation as they might deem expedient for the public good, thereby leaving this power as it previously existed. See [1] Hope *v.* Deaderick. If it had been the purpose of the convention to restrict the power of the legislature in this particular, this would certainly have been the appropriate place to insert the restriction. But, so far from doing so, we find only the proviso above referred to, which was intended only to exclude the idea that the first clause of the section against the granting of special privileges, immunities or exemptions, was intended to limit the power of the legislature in regard to granting charters of incorporation.

"From this the conclusion seems necessarily to follow that the legislature was still left the power to pass laws creating bodies corporate, with all the rights, privileges, immunities and exemptions which it was usual to vest in such fictitious persons under the general principle of

[1] Page 332.

law previously recognized; and, as we have seen, the power in question was previously recognized by the general law and the authorities of this State. We do not say that rights, privileges or immunities might be granted inconsistent with other positive restrictions of the Constitution, and this brings us again to the language of sec. 28 of art. 2, to wit: 'All lands liable to taxation held by deed, grant or entry, town lots, bank stock, etc., and such other property as the legislature may, from time to time, deem expedient, *shall be taxable.*' It has never been contended that this made it imperative upon the legislature to tax all property. That body might tax or omit to tax; that is, for the time exempt. If a tax was imposed it was required to be upon the value of the property, and according to the rules of equality. This is made more apparent by the change made by the Constitution of 1870, which declares that all property, real, personal, and mixed, *shall be taxed*, subject to the right of the legislature to exempt in certain cases, which are specifically defined. It is argued that the above clause makes all the property mentioned, and such other as the legislature might deem expedient, as continually subject to the power of taxation. That is, that it shall be and remain taxable, and that this forbids any action by the legislature which would place property beyond the power of taxation. On the other hand, this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the legislature in this regard as it stood before. This is the more natural construction, when we take this section in connection with the clause before referred to, and find that no express restriction is placed upon the power conceded to have previously existed in the legislature in respect to corporations in that clause which refers directly to the power to grant such charters.

"Again, the Constitution of 1834 declared that a well-regulated system of internal improvements should be encouraged, and for such purposes the legislature has often appropriated the revenues of the State, and further loaned the credit of the State to the extent of immense sums. The power to do this has never been questioned. If the legislature can thus appropriate and use the public money, it is difficult to see why it may not stipulate for the release of part of the public taxes for the same purpose, as it would be in effect the same. Upon this declaration of the Constitution the legislature have, from time to time, freely acted. The State was without railroads. It was regarded as a public necessity that roads should be constructed. They were to be constructed by corporations—in a sense, private corporations—and yet as it was believed that the resources of the State would be thereby developed and the public prosperity promoted, *they were regarded as public improvements*, and to be encouraged. Pacific Railroad *v.* McGuire, 2 Wall., 36. It was foreseen that as a private speculation such enterprises

would not pay, especially in those portions of the State where the cost of constructing the roads would be unusually heavy. . . . This was to some extent foreseen, and to meet this difficulty and *induce* capitalists to risk their money in the enterprise, this proposition to exempt the property to be thus created was made in consideration of the benefits expected to result to the public from the public improvement.

"The property now sought to be taxed was not then in existence. It has been created, in part, at least, by the money invested upon the faith of this stipulation—much of it, for aught we know, may have been brought from other States. The people of the State have certainly, to some extent, realized from the improvements the benefits anticipated, whether to the full extent or not is immaterial. It may or it may not have been a judicious contract upon the part of the State. The necessities for revenue now demand contribution from every available source. The property of some of these roads are valuable and exemptions are now odious. But if the law and the contract was valid at the time, we must in good faith abide by its terms according to its fair and just import. Upon this question it may be added that where there has been no judicial construction of a clause of the Constitution, the courts have given great weight to the construction given to the clause by other departments of the government. Stewart *v.* Land, 1 Cranch, 299; Martin *v.* Hunter, 1 Wheaton, 351; 6 Wheaton, 418; 12 Wheaton, 290. Several successive legislatures that met while this Constitution was in force, a period of thirty-six years, granted charters of incorporation, with total or partial exemptions for a time, and during the entire period the power was never questioned. On the contrary, all departments of the government acquiesced and obeyed the laws thus passed, and under these nearly all of our public improvements have been constructed. This uniform action upon the part of the Senate authorities is entitled to great weight. Upon this question we conclude that the legislature had the power to stipulate for the exemption in question." . . . It was also held: "That the State having provided for the adjudication of these questions, and the purchase having been made on the faith thereof, it can not question the validity of the adjudication." 68, 445. *K. & O. R. R. v. Hicks.* 1877.

Immunity Can Not Pass by Sale—When.—WAITE, C. J., held: "Immunity from taxation is not such a franchise of a railroad corporation as will pass by a sale under a mortgage or statutory lien on the property and franchises of the company. 102 U. S., 273–278." [1]*E. T., V. & G. R. R. Co. v. Hamblen County.* 1880.

"Privilege" Does Not Include Exemption, but is Used in Restrictive Sense.—TURNEY, J., held: "The word 'exemption' is not compre-

[1] Not in Tennessee Reports.

hended within the words 'rights and privileges,' as applied to a corporation claiming a right of exemption from taxation by virtue of a section of its charter conferring upon it the *rights and privileges* of a like corporation, which latter corporation was by express terms of the charter exempt from taxation." He said: "The first question, whether privilege is exemption from taxation, has been before us twice. The first time in the case of the [1]Miss. & Tenn. Railroad *v.* The State, at Jackson, and then again in the case of the E. T., Va. & Ga. Railroad *v.* Hamblen County, in both of which we held, after full argument, that the term privilege did not include exemption, nor was it so intended by the legislature in its use in any or either of the several acts referred to. However comprehensive a meaning may have been given to the term 'privilege' by the courts of other States, or by lexicographers, we are constrained to use it in the restricted sense and meaning given to it by our own laws and the Constitution of the State. That it was not intended or understood to be sufficiently broad by the framers of the Constitution of 1834 to embrace exemptions, is made clear and indisputable by reference to sec. 7 of art. 11 of that instrument by which it is ordained: 'The legislature shall have no power to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions, other than such as may,' etc. A legislature acting under this Constitution for its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the Constitution in the sense and with the meaning given it by that Constitution.

"The [2]acts in review in this case were passed while the Constitution of 1834 was in force and the Supreme law of the State, the chart defining the powers and jurisdictions of the several departments of the government, and under which they were organized and moved and acted, and conformity to which determined the legality of their acts. It can not be pretended or presumed that the able men comprising the convention which framed the Constitution used language or terms without a purpose or meaning, or double terms of the same meaning without more. We are satisfied the term 'privileges,' as employed in that Constitution, in the connection in which it appears, was used in its restrictive sense. That the interpretation we have given is the correct one is made the more manifest by the use of identically the same language in sec. 8 of art. 11 of the Constitution of 1870, which shows the convention of that year understood the terms 'privileges' and 'exemptions' to perform distinct offices, and to have been employed with different meanings, the latter more comprehensive."[3] 68, 549. *Wilson v. Gaines.* 1877.

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[1] Not reported.

[2] Act December 11, 1845, sec. 38.

[3] Affirmed by U. S. Supreme Court Feb. 28, 1881, WAITE, C. J., delivering the opinion which is reported in 103 U. S., 417–422. See also Third Tenn. Ch'cy Rep., 597.

Taxation—Sale of Railroad—Immunities Pass to Purchasers—When.—FREEMAN, J., held: "Where a railroad exempt for a certain period from taxation is sold under proceedings instituted by the State to enforce its lien or statutory mortgage, such proceedings being authorized by statute and providing for the sale of the road, franchises, etc., and providing that all the rights, privileges and immunities appertaining to the franchise shall be transferred to and vested in said purchaser and decree of sale so directing, the State is estopped to tax said road during the time the original company was exempt from taxation. In such case the immunity from taxation of the company passed by sale to the purchaser." 80, 583. *The State v. N., C. & St. L. R. R. Co.* 1883.

Act Exempting Corporation From Taxation on Condition that it Accept an Amendment to its Charter and Pay Specified Tax, Void—Charter Exemptions Discussed.—The acts under consideration were those of 1875, ch. 78, and March 20, 1877, amending the former act. COOPER, Chancellor, held: "The State Constitution of 1870 having expressly provided that 'all property shall be taxed,' an act of the legislature exempting from all other taxation, for a limited period, any railroad company which would accept certain amendments of its charter, and pay annually to the treasury of the State one and one-half per cent of its gross receipts, is beyond the competency of that body, unconstitutional and void; and this, although one of the accepted amendments of the charter provided for the relinquishment, after the period of exemption, of all exemptions from taxation contained in the original charter of the company."[1] After referring to the opinion of the court in the case of Ellis *v.* L. & N. R. R. Co., he said:

"The court in that case treated the Act of 1875 as a purely revenue law, and expressly held that the legislature could not, at any rate by such an act, agree, for a consideration, to exempt railroad property from the equal and uniform taxation prescribed by the State Constitution. A further study of that decision has removed all doubt as to its scope and meaning. It plainly holds that a tax of a certain per cent on the gross income of railroad companies is not a tax upon the property of the companies at all, but an exemption from such taxation, and beyond the competency of the legislature, under the new Constitution of 1870. It goes further, and directly meets the argument which has been most earnestly and ably pressed upon me by the learned counsel for the complainants, namely, that the existing exemption of the railroad property from taxation took it out of the mandate of the Constitution and left the legislature at liberty to make any contract it saw proper in relation thereto. The court say: 'The surrender of the supposed immunity from taxation, though it might be a good consideration for the grant of special exemptions or privileges in the absence of any constitutional prohibition to make such grant, can not give validity to an act of the legis-

lature which it is prohibited by the Constitution to pass.' It is true that there was no exemption then existing in relation to the property of the Louisville & Nashville Railroad Company, the subject of taxation in that suit, and, therefore, the premise on which the argument rested did not exist. But the argument, if it is to have any bearing on the case before us, must be held to go to this extent: that if an exemption exists at the date of the contract, no matter for how short a time it is to continue, it will sustain a contract for exemption for any length of time the legislature may determine; for the exemption which existed in 1875 as to the property of the company ran out, so far as the argument is concerned, on March 28th, 1877, and the exemption secured by the supposed contract extended for about eight years longer. The decision is, that the surrender of an immunity from taxation, though a good consideration for anything the legislature can constitutionally grant, can not confer upon the legislature a power it is expressly forbidden to exercise.

"The constitutional mandate that 'all property shall be taxed' prevents the legislature from granting any exemption whatsoever, no matter what may be the consideration. It can make no difference, therefore, whether the immunity surrendered be on the same property or on other property, or what may be the consideration, it is beyond the legislative competency to grant an exemption of property from taxation. It is not the nature or extent of the consideration which is to be looked to, but the legislative power. It is precisely as if the Constitution had forbidden the legislature to pledge the State credit for any purpose, and the legislature were to undertake to buy up existing indebtedness by pledging the State credit for a longer period. However supreme its authority may be in other directions, or however wise and judicious may be the exercise of its authority in the particular direction, the question is one of constitutional power. The court say the legislature is expressly forbidden to exempt. Existing exemptions can not, of course, be interfered with, but new exemptions are beyond legislative competency. It has unlimited power to deal with existing exemptions, provided it does not extend them, or grant other exemptions. The consideration it pays may take any other shape but that. Trask *v.* Maguire, 18 Wall., 392, 407. In this view, the rule of uniformity of taxation, prescribed by the same section of the Constitution, has nothing to do with the question of power. The court conceded that the legislature may direct the mode and choose the agencies for ascertaining the value of property, but must then tax, equally and uniformly, according to the value. And it holds, expressly, that a percentage on gross income is not a tax on property at all."[1] Third Tenn. Ch'cy Report, 604. *M. & C. R. R. Co. v. Gaines et al.* 1877.

[1] Affirmed, on appeal, by the Supreme court of the State in an unreported opinion, and by the United States Supreme court, December 2, 1878, WAITE, C. J., delivering the opinion, which is reported in **97** U. S., 697-712.

Exemption as Juror in Charter of Private Corporation, Invalid.— Neely was fined twenty-five dollars for failing to attend as a juror after being summoned. His defense was that he was a director in the M. & C. R. R. Co., the charter of which exempted directors from jury service. The lower court held the provision of the charter inoperative and void, because repugnant to the Constitution. DEADERICK, J.: "We are of opinion that the holding of his honor, the judge of the Criminal court, is correct. It is an attempt to pass a law for the benefit of individuals inconsistent with the general laws of the land, and purports to grant to individuals, who may be directors in said company, privileges, immunities and exemptions which are not extended to other members of the community who may be able to bring themselves within the provisions of such law, contrary to the provisions of art. 11, sec. 8, of the Constitution. Counsel for Neely have cited the case of Hawkins *v.* Small, 7 Bax., 193, in support of the validity of the exemption contained in the charter of said company. The case cited does sustain the position assumed, but it does not appear that the constitutionality of the provision in the charter, in that case, exempting a section hand from working on the public roads, was considered. Of course the constitutionality of the provision must have been taken for granted, otherwise the result announced could not have been attained. But the opinion does not discuss the validity of the exemption, but reaches the conclusion in favor of the exemption upon other grounds stated in the opinion. We are of opinion, however, that the case was erroneously decided, and overrule it, as it is liable to the same constitutional objections which lie against the case at bar." **72**, 316. *Neely v. The State.* 1880.

Same — Of Banking Corporations.

Exemption from Taxation — Transfer of Franchise — Legislative Recognition. — FOLKES, J.: "Well considered cases have gone so far as to hold that when the existence of a corporation has been recognized by acts of the legislature all inquiry into the original creation of the corporation is precluded. Society for Propagation of Gospel *v.* Pawlett, 4 Pet., 480; Matter of N. Y. Elevated R. R. Co., 70 N. Y., 338. Again: It becomes by such recognition *ipso facto* a legal corporation, and any defect or irregularity in the proceedings required by law to be taken for its organization will be deemed to have been waived. Black River & Utica R. R. Co. *v.* Barnard, 31 Bar., 258; Atlantic & Pacific R. R. Co. *v.* St. Louis, 66 Mo., 228; Turnpike Co. *v.* Davidson County, 3 Tenn. Ch'cy, 396. In which last case it is said by Judge COOPER, that 'after repeated recognitions of the existence of a turnpike corporation up to and inclusive of the last legislature, a collateral impeachment of its existence based on pre-existing facts, can not be entertained.' See also Waterman on Corp., sec. 42. Of course we do

not mean to be understood as placing any stress upon the legislative recognition by the Act of March 12th, 1873, as aiding in the conclusion that there is a valid corporate existence of the Bank of Commerce today: for it is manifest that if the savings bank had no valid existence prior to 1870, it could acquire none by legislative act since the Constitution of 1870, which provides that 'no corporation shall be created, or its powers increased or diminished by special laws.' But the change of name by special act of an existing corporation does not fall within the inhibition of the constitutional provision referred to, as such change of name does not involve, in any sense, a creation of a corporation, nor the increase or diminution of corporate powers. Wallace *v.* Loomis, 97 U. S.; Jones *v.* Haversham, 107 U. S., 174. The Bank of Commerce, therefore, with a valid organization and succession, possesses the franchises—including the exemption from all other taxes, except one-half of one per cent upon its capital stock—to the same extent, no more and no less, that were possessed by the Chattanooga Savings Institution under the original charter." 86, 629. *The State for use etc. v. Butler.* 1888.

Taxation of Shares of Stock—No Exemption Under Present Constitution—Exemptions Not Transmissible—Last Clause Construed in Connection With Other Provisions.—After quoting the last clause in the Constitution of 1834, art. 11, sec. 7, and its substitute in the Constitution of 1870, art. 11, sec. 8, CALDWELL, J., said: "There is some plausibility in the suggestion that this substituted language was intended to authorize the legislature to do by general law what it could do before by special law; but this concession is made only in connection with the qualifying statement that in both cases the legislative discretion is subordinate to other positive provisions of the organic law, and that in neither could it be made effective if exercised in conflict therewith. Though the legislature was empowered by the proviso of the seventh section of art. 11 of the Constitution of 1834 to grant such charters of incorporation, by special laws, as it deemed expedient for the public good, it could not, under that authority, grant corporate 'rights expressly forbidden by any other clause' of the same Constitution. McKinney *v.* Hotel Co.; Memphis *v.* Memphis Water Co. So it is, also, with reference to the Constitution of 1870. The whole instrument must be taken into consideration, and no part so construed as to impair or destroy any other part. Legislative powers enumerated in one clause must be defined and exercised with reference to limitations and requirements made in other clauses.

"With this fundamental rule of construction in view, and placing sec. 8 of art 11 and sec. 28 of art. 2 of the Constitution of 1870 in juxtaposition, the conclusion becomes irresistible that the framers of that instrument intended that the legislature *should not,* thenceforth, have power to grant immunity from taxation, by general law or otherwise, to

any new corporation, or to preserve an existing immunity to any old corporation in its change from one business to another fundamentally different. That power was taken away absolutely. . . . Unlike the revenue clause of the Constitution of 1834, the requirement here is positive and imperative that all property, except that mentioned for exemption, *shall be taxed.* This provision comprehends the whole domain of taxation; and, in explicit terms, prescribes the maximum of exemptions beyond which the legislature may not go. It declares what property *may* be and what *shall* be excepted from taxation, and directs that all the rest *shall be taxed.* By that mandatory direction the legislature is *prohibited* from making any other exemptions from taxation upon any ground or consideration whatever; 'and if it attempt to do so, the effort is unavailing and void for want of legislative power.' . . .

"Such an immunity as that claimed by the defendants in this case not being embraced in that exception, and being within the prohibition, the legislature has no power to grant it, either by original or amendatory enactment, however general in form and operation. It has already been seen, upon abundant citation of authority, that capital stock and shares of stock are *property.* They fall clearly within the constitutional requirement that *all property shall be taxed.* Hence there is no legislative power to exempt them. As especially in point, we refer to Bank of Shreveport *v.* Board of Assessors, 141 La. Ann., 188. Under the eighth section of art. 11 of the present Constitution the Legislature may, by general laws, provide for the organization of new corporations, and for the increase or diminution of the powers of old ones; but that is the limit. It can not go further, and grant immunity for taxation, for that is forbidden by sec. 28, art. 2, of the same instrument. This construction gives full force to both provisions in letter and in spirit, and makes them perfectly harmonious, while a contrary construction would produce irreconcilable conflict, and, in reality, override and set at naught the latter provision by the former one. Such a result is forbidden by every sound rule of interpretation, and will not be sanctioned for a moment.

"Again, it is competent for the legislature by general laws to increase the *powers* of existing corporations, but that does not mean that it may grant immunity from taxation. An *increase of powers* does not include a grant of immunity from taxation. The word 'powers' has not so wide a range, it is not so comprehensive in its scope as the other words of the same section, 'rights and privileges;' yet, these latter words do not embrace immunity from taxation. This, to our mind, is demonstration that the legislature, since the adoption of the Constitution of 1870, has no power to *grant* or *enlarge* an immunity from taxation to any private corporation, even by general law, whether creative or amendatory. Then, may it *preserve* such an immunity to corporations created before that date, when, by subsequent legislative sanction,

they divert their capital into channels not authorized by their original charters? Manifestly not. The lack of power to *preserve* the immunity for the new enterprise follows from the lack of power to grant it in the first instance. To *preserve* the immunity of an existing corporation in so radical a change as from an insurance to a banking business, the same measure of legislative power is requisite as in *granting* originally a similar immunity to independent incorporators desiring to enter upon a banking business upon subscriptions of money contributed for that purpose. The only ground upon which immunity from taxation can *now* be preserved to any corporation in this State, is that the charter granting it, when it was lawful so to do, is a contract whose obligation can no more be violated by constitutional amendment than by subsequent legislation. . . .

"It is competent for the legislature to *increase the powers* of existing corporations by general laws, but it can not preserve to them immunity from taxation, if, in availing themselves of their new powers, they divert their capital into new enterprises. It can no more preserve the immunity through such a change than it can extend the life of an expiring charter, and thereby preserve the immunity through another term. Either would be tantamount to granting an exemption originally. Hence both are forbidden. The most that can be properly said in favor of corporations having immunity from taxation, when the Constitution of 1870 was adopted, is, that so long as they pursue the business then authorized by their charters they are entitled to the full benefit of that immunity, but if they embark their capital in any business not legitimately within the scope of their charters at that date, whether the diversion be with or without legislative sanction, it thereby becomes, while so employed, subject to taxation as other property of the same species." **91**, 586. *Memphis v. Memphis City Bank.* 1892.

Charter Exemption from Taxation Construed—Failure to Fix Capital Stock—Exemption Attaches to Increased Capital Stock.—GEORGE GILLHAM, Sp. J., held: "The capital stock, and not the shares of stock, is exempt from taxation, under a charter providing that 'the said institution (corporation) shall have a lien on the stock for debts due it by the stockholders, before and in preference to the other creditors, except the State for taxes, and shall pay to the State an annual tax on one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes.' The prohibition of the Constitution of 1870 against exemptions from taxation does not prevent the exemption of a valid increase of the capital stock of a corporation made after 1870, under express authority contained in a charter granted prior to 1870, which exempted the capital stock from taxation." **95**, 224. [1] *The State v. Bank of Commerce.* 1895.

[1] See same case, art. 1, sec. 20, p. 191; art. 2, sec. 28, p. 317.

Same—Of Insurance Companies.

Acceptance of Charter—Exemptions Withdrawn by Constitution of 1870—Legislative Recognition—Effect of—Exemption Lost by Change of Business.—GEORGE GILLHAM, Sp. J., held: "Acceptance of charter is essential, and, to be effectual, it must be done within a reasonable time. A delay of twenty-four years is unreasonable. The Constitution of 1870 forbids the granting of charter exemptions from taxation, and had the effect to withdraw all offers of charter exemptions from taxation which had not been previously accepted. Legislative recognition of a corporation by changing its name and *situs*, will not give vitality to a charter exemption from taxation which had not been accepted within a reasonable time and had been withdrawn, before acceptance, by the Constitution of 1870. Failure for a period of twenty-four years, and until after the adoption of a Constitution prohibiting exemption from taxation, to accept a charter offering exemption from taxation to the corporation, will prevent a subsequent organization under the charter so as to secure the exemption, and the fact that, after organization, the corporation is recognized by the legislature by a statute changing its name and *situs* is immaterial. The charter of an insurance company can not be changed, so as to permit it to do banking instead of insurance business and at the same time preserve an exemption from taxation, after the adoption of the Constitution of 1870 prohibiting such exemptions." **95**, 203. [1]*The State v. Planters' etc. Insurance Co.* 1895.

Same—Of Water Companies.

Exclusive Privilege to Water Company—"Public Good."—NICHOLSON, J.: "Is the exclusive privilege granted by its charter to the Memphis Water Company forbidden? . . . It would be difficult to show that the privileges secured to the water company are not embraced within the prohibitions of this section, but it is even more clear that the power to grant an act of incorporation is forbidden by the language of the body of this section. The proviso to the section, however, gives the power to grant charters of incorporation, and for the purpose of enabling the legislature thereby to grant exclusive privileges, which, but for the proviso, would be prohibited by the body of the section. In this grant of power to create corporations, there is no limitation on its powers, at least, as curtailed by the general terms of the section. The legislature is required to consult 'the public good' in granting charters. 1 Sneed, 115; 4 Col., 414; Cooley's Con. Lim., 281." **52**, 530. *City of* [2]*Memphis v. Memphis Water Co.* 1871.

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[1] See also **95**, 212.

[2] See same case, art. 1, sec. 20, p. 185; art. 1, sec. 22, p. 229; art. 2, sec. 17, p. 273.

Same — Of Pool-Selling Associations.

Pool Selling by Chartered Association — Act of 1883, Chapter 138, Unconstitutional. — COOPER, J.: "The act makes it a misdemeanor, punishable by fine, 'for any person to sell pools, or to make any betting book or combination upon any race run, trotted or paced in this State, or in any other State of the United States, unless the said pool-selling, book-making or combination be conducted or made under and by the authority of a lawfully chartered or incorporated blood-horse or turf association, or trotting association, or stock or agricultural fair association of this State, and then only in the county in which said association or fair may be located. It is further enacted that any association operating under the provisions of this act shall pay an annual tax for the privilege to the State of one hundred dollars, and that the counties may collect a tax on the same not to exceed the State tax. . . . After a corporation is created for any purpose, and with specified powers, it becomes a person within the meaning of our penal[1] laws, or other general laws, and subject, like individuals to those laws. Its powers may be increased or diminished by general law, but it can be no more exempted than an individual citizen from the purview of a penal law. Lea *v.* The State. The exemption of classes of persons, not individuals, from the penalties of prohibiting acts is a different question. Maney *v.* The State; The State *v.* Rauscher; and see Davis *v.* The State. The question is, consequently, narrowed down to this: Was the act intended to increase the corporate powers of the particular class of corporations? And clearly it was not, for the powers and privileges are not extended to all of these corporations, but are restricted to such of them as choose to pay an annual tax therefor. What the statute in fact does is to create a new privilege, the right to sell pools, and make betting books upon races run either in or out of the State, and to limit the exercise of this privilege to a certain class of corporations. This can not be done. A privilege created for individual profit and taxation must be open to every member of the community who may be able to bring himself within the provisions of the general law which creates the privilege." **81**, 228. *Daly v. The State.* 1884.

Private and Municipal Corporations.

Corporations, Municipal and Private — Powers, Increasing and Diminishing — History and Meaning of This Section — Applicable to Private Corporations Only. — COOPER, J.: "The constitutional prohibition applies exclusively to private, not to public or municipal corporations. The first clause of the section quoted from the Constitution of 1870 was also contained in the Constitution of 1834, and was followed by these words:

[1] T. & S., 4870; M. & V., 5688.

'Provided, always, the legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good.' This proviso was left out of the Constitution of 1870, and its place supplied by the second clause of the section quoted: 'No corporation shall be created, or its powers increased or diminished by special laws,' etc. 'The power to grant charters of incorporation,' says Nicholson, C. J., 'is forbidden by the body of the Constitution of 1834, art. 11, sec. 7, but conferred by the proviso.' City of Memphis *v.* Memphis Waterworks, 5 Heis., 495, 530. The language was used by the chief justice in a case involving the rights of a private corporation, and was correct as to such corporations, in the sense of granting charters to individuals by special laws; for the charters of private corporations consist of 'rights, privileges, immunities or exemptions,' which the first clause of the section of both Constitutions provides shall not be granted to any individual or individuals by law, not extended by the same law to any member of the community who might be able to bring himself within its provisions. In view of these provisions, the power to grant special charters of incorporation to particular individuals for private purposes was prohibited. But the remark was not correct in reference to the power of the legislature to grant charters of municipal corporations; for nothing in the first clause of the section of the Constitution under consideration would have affected the inherent legislative power to create municipal corporations intended to subserve the public interests and not for the benefit of individuals. . . . 'A municipal corporation,' says Mr. Justice Hunt, 'in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all of the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action.' Barnes *v.* District of Columbia, 91 U. S., 540, 544. And this court has repeatedly said that the legislature has the power to create municipal corporations independently of any constitutional grant. Hope *v.* Deaderick; Nichol *v.* Mayor etc.; Trigally *v.* Mayor.

"The Constitution of 1870 does not contain the express grant of power to the legislature to create corporations conferred by the proviso of the Constitution of 1834, quoted above. The proviso is supplied by the clause: (Quoting last clause.) . . . This language plainly

implies that the inherent power of the legislature to create corporations, and, of course, to alter or repeal the charters of incorporation, remains in full force except in so far as it may be affected by the particular provisions of the section. The limitations upon the powers are that the 'rights, privileges, immunities or exemptions' of a corporation shall not be conferred upon particular individuals, but shall be so granted by law as to be open to any member of the community who may be able to bring himself within the law, and that the law itself shall be subject to alteration or repeal so as not to interfere with vested rights. But these limitations manifestly relate exclusively to private corporations; for franchises conferred merely for the public benefit can not be said to be granted to individuals, and were always subject to alteration or repeal, and never created vested rights. The provisions were utterly unnecessary and inapplicable in the case of municipal corporations, and were intended for private corporations. It is true the word 'corporation' is generic, and would ordinarily include both public and private corporations. It is also true, as said in the Luehrman case, that the weight of authority seems to be in favor of taking the word in its broad sense in the construction of Constitutions as well as statutes where there is nothing in the context to control the meaning. But the first clause of the section of the Constitution under consideration so clearly relates only to the conferring of rights, etc., upon individuals, and the limitations of the second clause are so manifestly directed to the same object, the scope and purpose of the entire section having no possible bearing upon municipal corporations, that we think the word should be restricted to that class of corporations which seems to have been alone contemplated by the provisions. The great diversity of municipal corporations required to meet the wants of local communities seems to demand a larger liberty of legislation than private corporations. The public exigency may demand special legislation for one community not proper for any other. And the general assembly has, undoubtedly, in numerous instances since the adoption of the Constitution of 1870, acted upon this construction of the legislative power. The Constitution itself, by art. 6, sec. 1, in providing how the judicial power of the State shall be vested, expressly authorizes the legislature to vest such jurisdiction in corporation courts as may be deemed necessary.' And the jurisdiction of such courts must, it need scarcely be said, vary with the population, extent of territory, and locality of the municipality. And the same may be said of the taxing powers which the legislature is authorized by the Constitution, art. 2, sec. 29, to confer upon incorporated towns.

"There is a result of the limitation of legislation in the creation of corporations, and the increase or diminution of their powers by general laws only, which would follow such legislation in regard to public as well as private corporations. And that is that the sessions of the legis-

lature would be less occupied in the consideration of merely local bills. But this is a mere incident, and not the object of the constitutional provision under consideration. It is probable, however, that this incidental benefit may have influenced the action of the constitutional convention, which is referred to in the Luehrman case, in voting down a motion to limit the particular section to private corporations. Whatever may have been the motive of this action, we are constrained to hold that the section itself, as adopted by the people, only applies to private corporations. The provisions of the section were intended to control legislation in reference to corporations in existence at the adoption of the Constitution of 1870, as well as to corporations created subsequently. The language is: 'No corporation shall be created, or its powers increased or diminished by special laws.' The plain meaning, in accord with the grammatical construction, is that no corporation shall be created, and no corporation shall have its powers increased or diminished by special laws. It was never intended that there should be a favored class of corporations whose powers might be increased by special laws merely because they happened to be in existence when the Constitution went into effect. The object of the provision was to place all corporations on a level as to rights, privileges, immunities, exemptions or powers afterwards conferred. The power of the legislature over corporations in other respects, as we have seen, is not affected." Judges FREEMAN and TURNEY dissented. **80**, 257. [1]*The State v. Wilson.* 1883.

To Private Corporations Only.—The court, by COOPER, J., held again the provision that no corporation shall be created, or its powers increased or diminished by special law applied to private corporations only. **83**, 638. [2]*Ballentine v. Mayor etc. of Pulaski et al.* 1885.

Municipal Corporations—Privileges, Immunities, Exemptions.

Legislature Can Not Delegate to Municipal Corporations Power to Grant Exclusive Franchise.—SHACKLEFORD, J.: "It is insisted for the complainants the ordinance of the board of mayor and aldermen, of the 20th of November, 1859, authorizing the construction of street railways, and granting the exclusive right of operating them, is void. The power attempted to be exercised by the board of mayor and aldermen is not warranted by the provisions of their charter, nor under the well-settled laws of this State could it be delegated. The right attempted to be granted by the ordinance of 20th of November, 1859, was an attempt to grant an exclusive privilege or franchise in the streets of the city. The right of granting a franchise, or an exclusive privilege to individuals, is, by the Constitution of the State, vested in the legislature. It is a high

[1] See same case, art. 2, sec. 17, p. 284; also M. & V., 1643; Acts 1881, ch. 87, and Acts 1883, ch. 110.

[2] See same case, art. 1, sec. 8, p. 62; art. 2, sec. 2, p. 252; art. 2, sec. 17, p. 277; art. 2, sec. 28, p. 333; art. 2, sec. 29, p. 371; art. 11, sec. 12.

and responsible trust—one that can not be delegated, and to be exercised by the legislature only when it is necessary for the public good. A municipal corporation is established by the legislative authority, and is vested, to a prescribed extent, with certain local powers to regulate its peculiar concerns according to its will. It has the right to exercise all the powers delegated by the charter. Any act done by those acting under the charter inconsistent with the provisions of the charter, the Constitution or the laws of the land, is void. Having no authority under their charter to grant the exclusive privilege of operating street railways on the streets in the city of Memphis to any class of individuals, it follows the ordinance of 20th of November, 1859, is void.

"The right of a corporation to grant the exclusive right of operating street railways to individuals came before the Supreme court of New York, where the right had been granted by the city to persons to construct and operate railroads on the streets of New York. It was held, in several well-considered cases, the corporations themselves had no power to confer upon individuals, by contract, the right of constructing and operating street railroads on public streets for their own benefit or individual use. 27 New York Rep., 611; 14 New York Rep., 506. This is clear, upon principle. The legislature having no power to delegate the right to create an incorporation, or the rights of franchise in the streets of a city, the city authorities have no power to make such contracts, as it would be the grant of a franchise.[1] The power, under the Constitution, is vested in the legislature to grant the right to use the streets and alleys of a city for lines of railways. Tennessee & Alabama Railroad *v.* E. W. Adams, 3 Head, 596; 27 Penn. Rep., 339; 7 Bur., 509. But this is a power that can not be delegated. It can alone be exercised under the provisions of the Constitution by the legislature. The mayor and aldermen had no authority, therefore, to contract with Kirk & Small and their associates to operate street railroads in the city of Memphis, or to confer upon them the exclusive right." 44, 414. *P. P. R. R. Co. v. Mayor etc. of Memphis.* 1867.

Can Not be Relieved From Duty of Giving Bond, Security, Etc., for Costs.—FREEMAN, J.: "By an act of the legislature of 1875, municipal corporations with a population of thirty-five thousand or more, were authorized to institute suits either at law or in equity in any of the State courts, without giving bond for costs, and also to prosecute appeals, writs of error, attachments, injunctions, etc., without giving security for costs. In this case a motion was made to dismiss the appeal of Memphis under this act. Held, that while municipal corporations in some sense are public bodies having powers conferred on them appertaining to sovereignty, such as power to levy and collect taxes,

[1] The State *v.* Armstrong, art. 2, sec. 2, p. 260.

yet in another aspect, as when they become suitors, or are sued in courts, they stand as individuals. In this latter view municipal corporations must be governed by the general law, and can have no 'general law suspended for their benefit,' etc. . . . The Act of 1875 is repugnant to this section of the Constitution, and therefore void." 68, 239. *City of Memphis v. Fisher.* 1877.

Objects of This Provision — Legislature May Repeal Charter of Municipal Corporation at Any Time — Control of Local Affairs — Powers of Municipal Corporations — Abolishment — Increase and Diminution Of. — COOPER, J.: "If the question were a new one, I would be inclined to hold that the section of the Constitution just cited was intended only as a restriction upon the legislative powers over private corporations. The weight of judicial authority has been, however, to treat words in a Constitution relating to corporations generally, such as 'corporate powers,' 'body politic or corporate,' and 'charters of incorporation,' as applying equally to public and private corporations. . . . It seems, also, that the journals of the constitutional convention of 1870 contain evidence that a motion to limit the provisions of the section above quoted, to private corporations, was voted down. Under these circumstances, although the history of the corresponding section in the previous Constitution of 1834, and the peculiar wording and context of the clause in question leave little doubt in my mind that only private corporations were intended, I will examine the objection made, upon the concession that public corporations are included.

"The prohibition of the Constitution is against the creation or the increase or diminution of the powers of a corporation by special law, and the direction is to provide by general laws 'for the organization of all corporations hereafter created.' The repeal of a general law, passed in accordance with this requirement, would necessarily affect all corporations organized under it. But the intention, so far as appears, was not to interfere with existing public corporations, however diverse might be the provisions of their respective charters. The powers of such corporations could not, it may be, be increased or diminished except by a general law, while there is nothing to prevent the repeal of an existing charter by special law, with a view to the reorganization of the corporate community under a general law. In no other way could the old charters be changed, except, indeed, by an indiscriminate repeal, a sweeping innovation certainly not expressed, and which the courts are not called upon to imply. The legislature might have enacted, after the adoption of the new Constitution, a general law, as has been done in regard to private corporations, for the organization of public corporations, and either not interfere with pre-existing charters, or only repeal such of them as chose to organize under the new act. And I am not prepared to hold that there is anything in the language of the Constitu-

tion which prohibits the legislature from repealing, at any time, the corporate privileges of a particular community, whether organized previous or subsequent to the adoption of the Constitution. This is a power so essential to sovereignty and the preservation by the State of its control over its instrumentalities of local rule, that it can not well be considered as cut off except by a positive provision to that effect. The restriction is against the powers of a corporation being 'diminished' by special laws, not against their entire abolishment. And we may conceive of cases where, by the vicissitudes of trade, as in the case of old Sarnum, in England, and some of the mining towns of California, the special repeal of a particular charter might be demanded by public policy, when a general repeal would be a remedy worse than the disease. All the authorities are agreed that municipal corporations are within the absolute control of the legislature, and may be abolished at any time in its discretion. Dill. Mun. Corp., secs. 30, 37, and cases cited. The reason is obvious. Being created as instrumentalities or arms of the government, they can not be continued in that capacity whenever the public exigency, of which the legislature alone is judge, demands that they should cease to act. . . . There can not be a doubt, therefore, that the Act of 1879, ch. 10, to repeal the charters of certain municipal corporations is constitutional, and that the charter of the city of Memphis is thereby repealed. . . .

"The government of incorporated towns has been based upon the idea of local self-government by popular representation, its prototype being the form of the State government. Several of the State Constitutions, in order to secure the permanency of the form, have expressly provided that the filling of the municipal offices, either by election or appointment, shall belong to the local authority. . . . Even in these States the provision of the Constitution is held to apply only to officers whose duties are plainly and exclusively local, and does not extend to officers whose duties concern the State at large or the general public, although exercised within the bounds of the municipality, such as officers of police, of health, of schools, and for the administration of justice. A board of police, it has been repeatedly held, may be appointed by the State, without reference to the wishes of the corporation, with powers to estimate the expense of the police, and to compel the city authorities to raise, by taxation, the amount so estimated. . . .

"These cases are instructive in showing the necessity of the government of the State intervening for the protection of the local communities against the oppression and inefficiency of their own servants, and how impolitic it may sometimes be to hamper legislative action by constitutional restraints. In the absence of such restraints, and our Constitution contains none, the maxim of republican government that local affairs should be managed in the local district, is subject, all the

authorities agree, to such exceptions as the legislative power shall see fit to make. The legislature has the power to do whatever is not expressly, or by necessary implication, forbidden by the Constitution. . . . It is for that body to determine, as the direct representative of the people, what the public good requires. The courts can only interfere when the legislature has violated the Constitution, not otherwise. 'The courts are not at liberty,' says Mr. Cooley, 'to declare an act void because it is, in their opinion, opposed to a spirit supposed to pervade the Constitution, but not expressed in words.' . . . That is a spirit which it is difficult satisfactorily to materialize, even by the most skillful judicial expert. Whenever the legislature, fresh from the people with an unlimited elective franchise, departs from democratic usage, the public exigency must be great which demands so unusual a remedy. The courts have no right to interfere unless there has been a violation of the organic law." Judges FREEMAN and TURNEY dissented. **70**, 431. [1]*Luehrman v. Taxing District of Shelby County.* 1879.

Municipal Privileges that are Not Prohibited—"Four-Mile Law" Constitutional.—COOPER, J.: "The first section of the [2]Act of 1877, ch. 23, makes it unlawful to sell or tipple any intoxicating beverage within four miles of an incorporated institution of learning in this State. The second section provides that the act shall not apply to the sale of such liquors within the limits of any incorporated town. . . . The ground of the demurrer is, that while the first section of the statute is a general law, the second section, by its exemption of persons selling within the limits of an incorporated town, deprives the act of its general character, and makes it a partial law within the prohibitions of the Constitution, art. 1, sec. 8, and art. 11, sec. 8. But 'an act which extends to and embraces all persons who are or may come into the like situation and circumstances' is a 'law of the land' within the section of the Bill of Rights cited. Mayor etc. of Alexandria *v.* Dearmon. And the Constitution, art. 11, sec. 8, while declaring that the legislature shall have no power to suspend any general law for the benefits of particular individuals, expressly authorizes the legislature to create corporations, or to increase or diminish their powers by general laws, thereby showing that municipal privileges originated in this way shall not be held to fall within the prohibitions of the section. The act under consideration is strictly analogous to one which has been on our statute books since 1824, and is brought into the Code, sec. 4854.[3] That section makes it a misdemeanor to expose to sale or gift any spirituous or other liquors within one mile from the place where any assemblage of persons is collected together for religious worship, and not at his usual place of business. The exemption from the penalties of the act of persons who may

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[1] See same case, art. 2, sec. 17, p. 280; art. 2, sec. 29, p. 355; art. 7, sec. 4, p. 473.

[2] M. & V., 5679.

[3] M. & V., 5665.

sell at their usual place of business has never been supposed to deprive the statute of its character as a general law. West *v.* The State, 9 Hum., 66." **69**, 97. *The State v. Rauscher.* 1878.

Act Exempting Operation of Four-Mile Law in Certain Municipal Corporations Void.—FREEMAN, J., held for the second time: "The Act of 1877, ch. 23, known as the four-mile law, forbidding sale of liquors within four miles of an incorporated institution of learning, is constitutional." Also that "the Act of 1883, amending the Act of 1877 so 'that this act shall not apply to the sale of such liquors within the limits of any incorporated town, except it be within the limits of corporations organized under the Act of 1882, ch. 127, known as taxing districts of the second class, to which it shall apply and within which such sales shall be unlawful,' is unconstitutional as a partial and not a general law." Judge FREEMAN, in discussing the latter act, said: "This is not a law governing all the municipal corporations of the State, but only such as are organized under the Act of 1882. The effect of the law is better seen, perhaps, by putting it in the affirmative and negative form as to the two classes of corporations, that is, that in all corporations under charters other than such charters as are provided for by the Act of 1882, it shall be lawful to sell spirituous liquors within four miles of an incorporated institution of learning, but in such as are organized under that act, and since that date, having the form of organization known as a taxing district, it shall not be lawful.

"It is seen that the prohibition is not applicable to all municipal corporations of the State, but is confined only to a few with exceptional charters. It would be as well to say it shall be lawful to sell liquors in all counties of the State except those organized since the Constitution of 1870, or in any one of the original civil districts of the county, but as to all newly laid off civil districts in the various counties of the State such sale shall be prohibited. This is beyond the competency of the legislature to do, is a partial and not a general law in any sense of these words, and therefore not a law of the land under the Constitution." **80**, 368. *Hatcher et al. v. The State.* 1883.

Change of Limits Can Not be by Chancery Court.—COOPER, J., held: "The courts of chancery is this State are not authorized by the Act of 1871, ch. 54, to change the territorial limits of a municipal corporation." **79**, 1. *Willett v. Corporation of Belleville.* 1883.

Extending Territorial Limits—Special Laws Affecting are Valid—Co-Existent, General and Special Laws.—The act under consideration was that of 1890 (ex. sess.), ch. 33. CALDWELL, J., held: "The territorial limits of an existing municipal corporation may be extended by a special law enacted for that sole purpose. Such act is not within the constitutional prohibition that 'no corporation shall be created, or its powers

increased or diminished by special laws.' This clause of the Constitution applies not to municipal, but alone to private corporations. . . . Although the general laws, and also the charter of the particular municipal corporation, have provided ample methods by which its boundaries might be extended without resort to further legislative action, yet the legislature has the power to accomplish that end by special statute. Special laws of this character are not within the constitutional prohibition that 'the legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land.'" **89**, 487. [1]*Williams v. Nashville.* 1891.

Stock Ordinance—Police Power.—SNODGRASS, J., held: "A municipal corporation has power to prohibit, under suitable penalties, the running at large of stock within a specified portion, less than the whole, of its territory. Such ordinance is within the police power of the corporation. It is not invalid as vicious class legislation." **92**, 73. *Chattanooga v. Norman.* 1892.

Taxing Land of the United States.—COOPER, J., held: "Land to which the United States acquired title under a direct tax sale is not exempt from State taxation while so held. The act of the legislature of March 31, 1885, which provides that all property held or owned by the United States under direct tax sales shall be exempt from taxation while so held or owned does not apply to taxes then in course of collection by suit, and is probably unconstitutional, except as a statute of limitation." **83**, 33. *Anderson v. Van Brocklin et al.* 1885.

Charitable Associations.

Delegation of Power—Grand Lodge I. O. O. F. Has No Authority to Confer Power on Subordinate Lodges.—J. M. DICKINSON, Sp. J.: "By an act passed in 1846 (ch. 69) 'the Grand Lodge of the Independent Order of Odd Fellows of the State of Tennessee' was incorporated with power 'to acquire, hold, possess, use, occupy, and enjoy real and personal estate to the amount of twenty thousand dollars, and to sell and convey, or otherwise dispose of the same under by-laws, rules, and regulations of said lodge, and to be competent to contract and be contracted with, to sue and be sued, plead and be impleaded,' etc. By ch. 60, Acts of 1847, the former act was amended so 'that whenever said grand lodge shall establish or charter a subordinate lodge, the said subordinate lodge is hereby invested with the separate right to an amount of real and personal property not exceeding the sum of ten thousand dollars, to the same extent and under the guards and restrictions of the aforesaid Act of 19th of January, 1846. The third section of the amend-

[1] See same case, art. 1, sec. 8, p. 63; art. 2, sec. 2, p. 255; art. 2, sec. 19, p. 306.

atory act provides, that 'whenever the authority establishing said subordinate lodge shall be withdrawn and the separate existence of said subordinate lodge be destroyed, the property of said lodge shall be placed in the hands of a trustee appointed by the grand lodge to pay the debts and liabilities of said subordinate lodge, and the residue of the real estate, if there be any, to be applied by the trustee as may be prescribed by the by-laws of said subordinate lodge; *provided*, the benefit of this act shall extend to lodges already established as well as to those to be created.' It is insisted that the defendant lodge could not, by virtue of these acts, become a corporation, because the legislature can not delegate the power to create corporations, and that this is the effect of the foregoing acts, if it be insisted that their purpose was to make subordinate lodges legal persons. . . . The acts chartering the grand lodge of the State do not delegate to it the authority to confer any powers upon subordinate lodges. The legislative discretion in this respect is not parted with, but the power with which such lodges is to be clothed is distinctly defined in the act. There can be no distinction drawn between these acts in this respect and the one sustained in Mayor *v.* Shelton, except that, under the former, the association of individuals, upon whom the power under the legislative enactment devolved, was organized by the grand lodge, while under the latter it was effected by the recording act of the County court. In neither case was any power, right, liability or immunity imparted, beyond what the legislative will had expressly passed upon and sanctioned in advance.

"We know of no principle which makes such investure of power in the grand lodge as is given by these acts void, or against public policy. When these acts were passed there was no general law by which the right to hold property might be acquired by an association, and it would have been highly inconvenient to the order and harassing to the legisture if a separate act had been necessary every time a subordinate lodge was created. The purposes were benevolent, and not for private gain. The life and harmony of the order depended upon judicious care in constituting subordinate lodges, and there was, in the nature of things, no probability of any abuse from the provision for clothing with the limited rights designated such branches as might be established.

"The maintenance of the constitutionality of these laws, and the validity of the acts done under them, does not establish that the defendant lodge is a corporation. No certain form is necessary to a grant of corporate franchises, nor is the use of the word 'incorporate' indispensable. The real character and attributes must be looked at to determine whether there was a purpose to create a corporation. Morawitz, section 18. There is nothing in these acts indicating any such intent. The only power conferred is the right to hold a certain amount of property." **87**, 680. *Heiskell v. Chickasaw Lodge.* 1889.

PRIVATE AND LOCAL AFFAIRS.

ART. 11, SEC. 9. The legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient.[1] [Same as Const. 1834, art. 11, sec. 8.]

This Section Does Not Authorize an Act Giving Circuit Courts Power to Grant Charters.—The act under consideration was ch. 254, passed February 26, 1856, conferring upon the Circuit courts power to grant charters. MCKINNEY, J.: "It is argued that the validity of this act may be maintained under section 8 of the article of the Constitution before referred to. That section is as follows: 'The legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient.' This clause follows in immediate proximity that . . . which confines the power in question to the legislature. And it is obvious that the framers of the Constitution did not intend, by this clause, that the courts should be invested with the power of conferring corporate capacities and privileges, in the proper and general sense of these terms. This power, by the preceding clause, had been distinctly, and in explicit terms, vested in the legislature, and it would be in violation of every just principle of interpretation to assume that if it were intended that the courts might be vested concurrently, for some purposes, with the exercise of a power properly belonging, from its nature, to the legislature, and previously granted to that department, that such intention would not have been declared in express terms. And there is such an apparent incongruity and unfitness in the scheme of erecting some seventy-odd local tribunals, each clothed with the power to grant charters of incorporation to all persons and for all purposes, as to forbid any amplitude of construction for the purpose of sustaining the act in question. But there is little room for construction in reference to this clause. We must suppose that the framers of the Constitution intended what their language naturally imports. In the one clause they speak of the power to grant 'charters of incorporation,' and dispose of that power by intrusting it to the legislature. In the other clause they merely speak of 'powers' in regard to 'private and local affairs.' This term 'powers,' it must be admitted, is not very definite, yet the distinction between the object and purposes contemplated by the two clauses is perhaps as obvious and as marked as is the difference between mere matters of the nature of county police, which do not need the machinery of a corporation for their attainment, and those matters of more important and general concern, affecting the 'public good,' which demand the facilities

[1] See L. & N. R. R. Co. *v.* Davidison County, art. 2, sec. 29, p. 335; N. & K. R. R. Co. *v.* Wilson County, art. 6, sec. 1, p. 414. Also **48**, 417, and **58**, 666.

and exclusive benefits of corporate capacities and privileges in order to their successful operation.

"When the important difference is considered between the power to create a corporate body, with all its exclusive privileges and exemptions, to be held in perpetual succession, and the simple power to confer certain previously defined rights and privileges upon individuals, as natural persons, to be held and enjoyed, or transferred, as other civil rights, we can readily enough understand what was designed by the clause of the Constitution now under consideration. It was, no doubt, thought to be enough for the convenience and well-being of the community that, by a general law, to be enacted by the legislature and made applicable to all persons who might bring themselves within its provisions, the courts might be empowered, as the instruments of the legislature, to grant individuals, as citizens and members of the community, such rights and privileges defined by law, in regard to matters of a purely private and local nature, as the legislature should deem it expedient to bestow. An authority of this nature had been imparted to the courts, in various instances, by the legislature prior to the introduction of this clause into the amended Constitution of 1834; and these, and such like rights and privileges, were contemplated by its provisions. The case before us does not, however, require that we should attempt to define the precise extent of the 'powers' within the purview of the clause. It is sufficient for the present case to determine, as we do, that it does not authorize the legislature to invest the courts with power to grant 'charters of incorporation." **35**, 657. [1] *The State v. Armstrong.* 1856.

Enterprises to Which This Section has Reference — Tax to Repair Roads — Power of County Court to Levy. — ANDREWS, J.: "It is claimed, on behalf of the defendants, that if authority for their action be wanting elsewhere, it is found in sec. [2]1257 of the Code. . . . The constitutional provisions referred to in this section are, briefly, and in substance, that the legislature may vest powers in the courts of justice with regard to private and local affairs; and that a 'well regulated system of internal improvements ought to be encouraged by the general assembly.' The authority of the County court under this section of the Code has no reference to works of public improvement to be undertaken, made and paid for by the county, but to those private enterprises undertaken with more or less reference to the public convenience, but for private gain, which require to be licensed, or may be regulated by the County court, and are in the nature of privileges. . . . This section clearly has reference only to such *quasi* public enterprises as are in the nature of privileges, to be granted to and exercised by individuals or corporations; and we can not suppose that, in incorporating its sub-

[1] See same case, art. 2, secs. 1 and 2, p. 260.

[2] T. & S., 1257; M. & V., 1439.

stance and most of its phraseology in the Code, the legislature intended to change the whole scope of the act, and make it apply to a totally different class of subjects and confer wholly different powers upon the County court. We have no doubt that the powers granted to or recognized in the County courts are the same under these two sections; and that neither of them confers the power to undertake the general construction of public roads by the County court, at the expense of the county." **47**, 55. *Hunter v. Justices of Campbell County.* 1869.

ART. 11, SEC. 10. A well regulated system of internal improvement is calculated to develop the resources of the State and promote the happiness and prosperity of her citizens; therefore it ought to be encouraged by the general assembly.[1] [Same as Const. 1834, art. 11, sec. 9.]

HOMESTEAD.

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ART. 11, SEC. 11. A homestead in the possession of each head of a family, and the improvements thereon to the value, in all, of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife when that relation exists. This exemption shall not operate against public taxes, nor debts contracted for the purchase money of such homestead or improvements thereon.[2]

Debtor—Power to Alien Land Previous to Homestead Law of 1870.—MCFARLAND, J., held: "After the passage of the homestead law of 1868, and up to the 5th of May, 1870, a debtor, by his own deed, had the power to alien his land, or mortgage it to secure his creditors, without the consent of his wife; except where the household had been claimed, set apart and registered. . . . But since the 5th of May, 1870, the

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[1] See L. & N. R. R. Co. *v.* Davidson County, art. 2, sec 29, p. 335; Mitchell *v.* Turnpike Co., art. 3, sec. 9, p. 386; N. & K. R. R. Co. *v.* Wilson County, art. 6, sec. 1, p. 414. Also **94**, 49.

[2] See **58**, 515; **60**, 43; **66**, 117; **69**, 229; **71**, 304, 358; **76**, 392; **82**, 370; **84**, 373; **86**, 451, 659; **87**, 335, 393; **89**, 90, 337; **92**, 412; **94**, 241.
TENN. LEG. REP., VOL. 1, pp. 21, 22, 28, 281, 326.
" " " VOL. 2, p. 210.
" " " VOL. 3, p. 70.
Second Tenn. Chc'y Rep., p. 606.
Third Tenn. Chc'y Rep., p. 547.

husband can not alien the homestead, except by the joint deed of himself and wife, whether it has been set apart or not. This act does not impair the obligation of contracts entered into between the passage of the [1]Act of 1868 and May 5, 1870, when the new Constitution went into force." 60, 222. *Kennedy et al. v. Stacey et al.* 1872.

This Provision No Exemption Against Pre-existing Debts—Obligation of Contracts Not to be Impaired.—FREEMAN, J.: "Is the exemption of a homestead, by the provision of the Constitution and law of 1870, void so far as it may affect debts contracted before its adoption, or can the section of the Constitution be held to operate as against such debts? The question depends upon whether such exemption impairs the obligation of the contract. Before examining the authorities on this question, we may lay it down as conceded by all the courts whose decisions we have seen on this question, either expressly or by clear implication, that to deprive the creditor of the right to enforce collection of his debt by prohibiting him from reaching all of the property of his debtor from appropriation to the payment of his debt, by a law passed after the creation of the debt, would certainly be within the inhibition of the Constitution. This being conceded, necessarily carries with it the proposition, that in some way the right to enforce the collection of the debt by appropriation of the debtor's property to its satisfaction, inheres in and is a part of the obligation of the contract of the debtor, and is a right of the creditor. If this be so, then this part of the obligation is inviolate by the clause of the Constitution of the United States, and can not be impaired or lessened in its effectiveness; nor can the principle be changed, by calling it part of the remedy, and then recurring to the other principle, well settled, that the legislature may alter or modify the remedy at its will, so that some equally efficient remedy be left the party. The clause of the Constitution of the United States, the construction and application of which is before us in this case, though expressed in the most concise terms, 'no State shall pass any law impairing the obligation of contracts,' has given rise to as much able and exhaustive discussion and diversity of views as perhaps any other part of that instrument.

"While there is much diversity of decision in the State courts in the application of the principles settled by the Supreme court of the United States, as to the true construction of these words, we think there can be but little difficulty in arriving at the principle itself, upon an examination of the decisions of that high tribunal. This principle is perhaps as well and fully stated in the case of McCracken *v.* Hayward, 2 How. (Curtis' Ed.), 221, 222, as in any other case. The case arose under a law of Illinois, which required, in substance, that when property should

[1] M. & V., 2935 et seq.

be levied on by execution, three householders should value the property at its cash value, and endorse the amount on the execution or on a paper attached to it; and when such property should be offered for sale it should not be struck off unless two-thirds of the amount of such valuation should be bid for it. The court says: 'In placing the obligation of the contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution, annulling all State legislation which impaired the obligation. It was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract, according to their settled legal meaning, when it becomes consummated.

"'The law defines the duty and the right—compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act on the remedy, is directly obnoxious to the prohibition of the Constitution.' Again, after referring to the laws for enforcing the contract in existence at the time of making the contract, the court says: 'These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions.' In accordance with this reasoning the court held the law of Illinois void, as impairing the obligation of the contract. . . . It is not the extent to which the obligation is impaired in dollars that is prohibited by the Constitution, but it imperatively forbids that it shall be impaired at all. To impair the value of the duty to be performed by the debtor to his creditor to the extent of one dollar is as much prohibited as to do so to the extent of thousands. The entire obligation is made sacred and inviolable by the supreme law of the land. We therefore conclude the sound rule to be, that such property as was subject to execution at the time the debt was contracted must remain subject to execution, or sale by other process, until the debt is paid." **65**, 228. *Hannum v. McInturff.* 1873.

"Head of Family"—Who Was Intended by Framers of this Section—Widow Is—When.— COOPER, Chancellor, held: "A widow who is keeping house upon land allotted to her in dower, without any children of her own, but with five orphan children of a deceased sister who had been members of the family during her husband's life, and with two other orphan children of her late husband, is the head of the family, within the meaning of the Constitution and the homestead laws[1] passed in accordance therewith, and entitled to the homestead exemption in the dower estate." In delivering the opinion he said: "The language, both of the Constitution of 1870 and of the act of the legislature above quoted, fairly implies that the draftsmen had in their minds as 'head of the family' a husband, to whose wife and children the benefit would enure through him. The only thing in the act implying otherwise is the wording of the third section, just quoted, which says 'his or her homestead shall be set apart in the following manner.' And even here the word 'her' might be limited to cases where the homestead right commenced in the lifetime of the husband. And yet, notwithstanding the peculiar phraseology of the Constitution and the act of the legislature, I can not think that the benefits of the homestead were intended to be thus limited.

"The phrase, 'head of a family,' would clearly embrace a husband with a wife and children, or a husband with a wife alone occupying a homestead. But it has never been considered as confined within these narrow limits. Under the Act of 1833, ch. 80, exempting certain personal property in favor of the 'head of a family engaged in agriculture,' it was held by our Supreme court that a widow who, with her children, lived with her father on his farm, and in the same house, and assisted in carrying on the farm by the aid of her sons, was entitled to the benefit of the exemption. Bachman *v.* Crawford, 3 Hum., 213. . . .

"The light afforded by the decision of other States being thus scanty, it is obvious that our courts must construe our Constitution and laws on this subject from their own intrinsic light, with such aid as can be derived from our own decisions on analogous questions. The object of the Constitution and the laws is to secure to a householder and family the benefit of a home, beyond the reach of legal process on the part of creditors. With the policy of the legislation the courts have nothing to do. Their duty is to ascertain the intention of the constitutional convention and the legislature, from the language used by them, and to carry out that intention in the decision of rights of individuals. Coming back to the language used, as hereinbefore quoted, I find that the homestead exemption is conceded 'to each head of a family.' We know that, by the well-settled rules of constitutional and legislative interpretations, words importing the masculine gender include the feminine—a rule properly embodied in the Code, par. 50.

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[1] Acts 1870, sec. sess., ch. 80, sec. 1; M. & V., 2935.

"I also find that, by the third section of the Act of 1870, wherever the real estate 'of such head of a family' is levied on, it is provided that 'his or her homestead' shall be set apart, etc. I further find that our Supreme court in construing the words 'head of a family,' in a statute exempting certain personalty, held them to include a widow living with her father, as before set out. I find the Supreme court of Georgia construing the same words as embracing a bachelor keeping house and supporting a mother and two sisters, and the Supreme court of California construing the words as embracing unmarried persons having the charge of minor brothers and sisters, or minor children of brothers and sisters. It seems to me, with these lights, that I am justified in considering a widow residing upon her dower land, keeping house, and having the charge of the orphan children of a sister, and children of a sister of her late husband, as entitled to the benefit of the homestead exemption." Second Tenn. Chc'y Rep., p. 36. *Brien ex parte.* 1874.

Conveyance of Homestead Without Wife's Consent—Object of this Clause.—NICHOLSON, J.: "The Constitution secures a homestead in the possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, and exempts the same from sale under legal process during the life of such head of a family. The plain intention of this provision is, not merely to protect the husband, as the head of the family, in the possession and enjoyment of the homestead, but the protection of the interests of the wife and of the minor children, constituted a leading consideration for the adoption of the provision. This fact is apparent by the prohibition against the alienation of the property, without the joint consent of the husband and wife, when that relation exists. To give complete protection to the wife and children, the homestead is not only exempt from the reach of creditors of the husband, but he is deprived of the power to defeat the enjoyment of the homestead by his wife and children, by selling and conveying it, except by deed in which she joins." Tenn. Leg. Rep., vol. 1, p. 316. *Williams et al. v. Williams et al.* 1874.

When Homestead Was Alienable.—DEADERICK, J., held: "Before the establishment of the Constitution, on the 5th of May, 1870, there existed no constitutional or other legal inhibition to restrain the alienation of a homestead by husband, all transfers anterior to that date are valid." **63**, 233. [1]*Bilbrey v. Poston.* 1874.

Homestead Intended for Benefit of Family—Widow—Who Is and Who Is Not.—CALDWELL, J.: "The homestead exemption is intended solely for the benefit of the *family*, and none are authorized in law to partici-

[1] See same case, under Ordinance.

pate in its advantages except those who come within the meaning of that term. Ordinarily the wife is entitled to share in the homestead, because she is ordinarily a member of the family; but if she voluntarily withdraw from the family circle without cause, and of her free choice live elsewhere, she then and thereby excludes herself from the enjoyment of the homestead with the family. So the 'widow,' to whom the right of homestead inures at the death of her husband, must have been a member of his family in a legal sense when he died; otherwise she can not successfully assert a claim to homestead in his estate after his death. This does not imply that she must in fact and in all instances have been residing with her husband upon the homestead at the time of his death; it is sufficient that she was, at that time, *in law entitled to such residence with him, or with the family.* But, if she has, willfully and without excuse, deserted the family and eloped and lived with an adulterer, or otherwise so demeaned herself that she may neither in morals nor in law require the husband to receive her back again, she is, in such case, not a member of his family while he lives, and does not become his 'widow' in contemplation of the homestead laws when he dies." 87, 87. *Prater v. Prater.* 1888.

Debtor Who Acquires Right of Homestead by Marriage May Assert That Right Against Antecedent Debts—When.—LURTON, J., held: "A debtor who acquires the right to homestead by reason of his marriage, can assert that right against antecedent debts in lands owned by him at the time such debts were contracted, if his creditors had fixed no lien upon the lands at the date of his marriage." He said: "The contention of the creditor is, that, as to debts created before he became the head of a family, the law does impair the obligation of the contract if it be held applicable to property owned by the debtor before he became the head of a family and at the time he entered into the obligation, such property being then subject to forced sale. . . . The law which gives the creditor his remedy, and the law which gives the debtor his exemption, are as much parts of the contract as if they had been set forth in the stipulations of the agreement by which the debt was originated. The homestead law was in force at the time this contract was entered into between Dye and Cooke & Co. The law has not since been changed. The attitude of their debtor toward the law has changed by his subsequent marriage. The creditor knew that if before they had fixed a lien upon this land their debtor should become the head of a family that he would be entitled to a homestead exemption. . . . No legal right of the creditors has been impaired, and no fraud has been practiced upon them. A different question would arise if they had acquired a lien by levy or judgment before his marriage, upon which it is unnecessary to intimate an opinion." 88, 277. *Dye v. Cooke.* 1889.

COMMON SCHOOLS.

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ART. 11, SEC. 12. Knowledge, learning, and virture being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the general assembly, in all future periods of this government, to cherish literature and science. And the fund called the *common school fund*, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever heretofore by law appropriated by the general assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principle of which shall never be diminished by legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no laws shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools. [Const. 1834, art. 11, sec. 10, down to this point was same as above.] The State tax derived hereafter from polls shall be appropriated to educational purposes, in such manner as the general assembly shall, from time to time, direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. (The above provision shall not prevent the legislature from carrying into effect any laws that have been passed in favor of the colleges, universities, or academies, or from authorizing heirs or distributees to receive and enjoy [1] escheated property under such laws as may be passed from time to time.[2])

[The clause in parenthesis above was art. 11, sec. 11, of Constitution of 1834. In that instrument, after the sentence closing at the first brackets, was the following provision instead of the clauses between the last bracket and the first parenthetical mark above: "And it shall be the duty of the general assembly to appoint a board of commissioners, for such term of time as they may think proper, who shall have the general superintendence of said fund, and who shall make a report of the condition of same from time to time under such rules, regulations, and restrictions as may be required by law; provided, that if at any time hereafter a division of the public lands of the United States, or of the money arising from the sales of such lands, shall be made among the individual States, the part of such lands or money coming to this State shall be devoted to the purposes of education and internal improvement, and shall never be applied to any other purpose."]

Power of the Legislature Over Common Funds Under the Constitution of 1796 Was Absolute — Changes Made by the Constitution of 1834— Legislature May Compromise Law Suits — Obligation of Contract Not Affected. — Robert H. McEwen was State superintendent of public instruction under the old law (Act 1835, chapter 23), and he and his bondsmen were sued to recover money lost by McEwen's bad invest-

[1] See **32**, 47, 600; **33**, 359; **41**, 388; M. & V., 2961.

[2] See **17**, 164; **50**, 540; **87**, 234.

ments. Pending the suit the legislature passed an act appointing a committee to compromise the suit with the sureties "upon principles of right and justice toward the sureties, and to the best interest of the school fund, and that the compromise and decision of a majority of the committee when made and returned into the Supreme court of the State should become the judgment of the court so far as the sureties were concerned." This report was made. The request to have it made the decree of the court was resisted by counsel for complainants. TURLEY, J.: "It is argued that the tenth section of the eleventh article of the Constitution places the school fund beyond the control of the general assembly, and vests in the board of commissioners of common schools, who alone have the power to collect, compromise, and arrange any debts or demands belonging to this fund, and placed under their supervision by the Act of 1835, chapter 23; and that, therefore, the resolutions of the general assembly of January 19 and 27 are in violation of the provisions of the Constitution, and null and void. In the argument of this proposition it becomes important to inquire: first, what was the power of the general assembly over the common school fund previous to the adoption of the amended Constitution of 1834? second, what alterations has the instrument made as to this power, and what prohibitions has it introduced in regard to its exercise?

"That the legislature of the State, in the absence of constitutional prohibition, is the proper guardian and protector of its funds, no matter for what purpose appropriated, and that, as such, it is its duty to watch over them, to see that they are properly secured, vested, and applied, as the law may direct, is a proposition so palpably in accordance with reason and necessity that it were a waste of time to enter into an argument to prove it. It necessarily follows that, if these funds, or any portion of them, be out of the treasury, and in the hands of a citizen, the power to collect, compromise, and arrange the same with the citizen belongs to the legislature, to be exercised according to its best judgment, for the security and prosperity of the State, and upon principles of right and justice to the citizen. This power, on the part of the legislature, is supreme, and, when exercised, can not be revised or called in question by any other power whatever; and it may be exercised by that body in its collective capacity, or it may be delegated to a commission —the decision of which, when made in pursuance of the power delegated, is equally final and conclusive, if the delegation extend thus far. There is in this respect no difference arising out of the nature of the fund. The power is the same, be the fund appropriated or unappropriated—whether it has been set apart for internal improvement, banking operations, common schools, or any other purpose whatever. This power is inherent in the legislative department of the State, and it is neither lost nor diminished by the fact that curators may have been

appointed for the safe-keeping of the funds, or to superintend the distribution of them in pursuance of appropriations made by law, such as a treasurer, commissioners of internal improvements, president and directors of a bank founded upon State funds, board of commissioners of common schools, etc. Then the power of the legislature over the school fund, previous to the adoption of the Constitution of 1834, was absolute and uncontrollable. It might have been diverted from the purposes for which it was created, at any time, and directed in an entirely different channel; it might have been squandered and wasted upon any wild scheme of speculation or improvement; it might have been appropriated to the payment of our public debt; it might have been distributed in bounties and premiums to our citizens; it might have been given to asylums; it might have been applied to lighten the burden of taxation for the time being; or disposed of in any other way that might have seemed meet and proper to that body. Such was the power over this fund, on the part of the general assembly, at the adoption of the Constitution of 1834.

"What is it since? We have seen that the legislature of the State had evinced for years much anxiety to promote a system of common schools; that great attention had been paid to the accumulation of sufficient funds for that purpose; that all available means had been appropriated to it; that a board of common school commissioners had been established in the different counties to superintend it; and that in 1827 legislative provision had been made for the appropriation of this fund forever to the use of common schools. What change upon this question has been effected by the Constitution of 1834? But two. The legislature of 1827 had appropriated the fund forever to the purposes for which it was created. This was a legislative promise that it should be held sacred; but, inasmuch as this promise was not legally binding on subsequent legislatures, the framers of the Constitution of 1834 were determined to make it sure, by establishing it as a fundamental principle not to be violated by legislative enactment. Accordingly, the tenth section of the eleventh article makes the fund perpetual, the principal of which shall never be diminished by legislative appropriation, and the interest of which shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and prohibits the passing of any law authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools. This, then, is one change made upon the system as it existed at the time the Constitution was adopted. What is the other?

"It is made the duty of the general assembly to appoint a general board of commissioners for the State (in place of the board of common school commissioners previously appointed in each county of the State),

who shall have the general superintendence of said fund, from time to time, under such rules, regulations, and restrictions as may be required by law. The Constitution of 1834, then, prohibits the legislature from doing one thing in relation to the subject which it might have done previously, to wit: passing any law diverting either the principal or interest of the fund from the purpose for which it was designed — the support of common schools. And it makes it the duty of the legislature to do one thing which it was not previously bound to do, viz.: to appoint a board of commissioners for the State, to have the general superintendence of the fund. All other things are left as they were previously to the adoption of the Constitution — that is, subject to the control and discretion of the legislature.

"The question, then, arises at once, Is the adoption of the resolutions of the general assembly of the 19th and 27th of January, in relation to the matter in controversy, a violation of either the prohibitory or mandatory provisions of the tenth section of the eleventh article of the Constitution of 1834? We have seen that these resolutions are for the appointment of commissioners to compromise and settle with the sureties of Robert H. McEwen, the matters in controversy, upon principles of right and justice towards the sureties, and to the best interest of the school fund. We have endeavored to show that the power to settle, arrange, and compromise any suit, or demand for money due from a citizen to the general treasury of the State, or which may have been appropriated by the State to any public institution or charity, is inherent in the legislative department of the State, and may be exercised without supervision or control, and that this power may be delegated. The exercise of this power, like all others belonging to the legislative department, can only be restricted by constitutional provision.

"Is the exercise of it in the present case in conflict with the constitutional prohibition to pass any law diverting the school fund, or any part thereof, to any other use than the support of common schools? We think most clearly not. It is not an attempt at appropriation, but an effort to arrange, compromise, and secure a portion of the school fund in the hands of an individual citizen which was in jeopardy, and, but for the existence of this power and its exercise, might have been entirely lost. It is not an attempt to divert the fund to improper uses, but merely the surrendering a portion in order to secure the balance. That the power to do this ought to exist, and does exist somewhere, is not denied by the counsel who appear for the complainants; but it is argued that it properly belongs to the board of commissioners of common schools; that it is dangerous to trust it with the legislature; and that, by fair implication, it has been taken from it. To this it is to be answered: First, that the power of the legislature can not be restricted by implication—it must be by express prohibition; second, the argu-

ment that a power may be abused is no argument against the vesting it. All human power is liable to abuse, no matter where it is vested; and in the present case there is as much safety in the exercise of it by the legislature as by the board of commissioners of common schools—perhaps more. If public opinion and the responsibilities of the members of their constituents will not guarantee a proper exercise of it, what assurance have we that a board of common school commissioners may be entrusted with it? In avoiding Scylla, let us be careful that we do not fall upon Charybdis. But is this power given to the board of commissioners, either expressly or impliedly? Most assuredly it is not by the Constitution. . . .

"These public corporations are made for public convenience. No private rights are involved in them, and, therefore, the legislature in interfering with them is in no danger of violating the obligation of contracts or public faith; and although it may have thought proper to delegate a portion of its own legitimate power to such corporation for the public benefit, yet the same may be resumed at any time, and exercised temporarily by the legislature, at its discretion; or the corporation may at any moment be deprived of it altogether, and such has been the constant practice in this State in relation to debts due our State bank, which the legislature have been in the habit of compromising by resolution, though no one doubts that the president and board of directors have full power to do themselves; and this constitutes an important difference between a public corporation and a private one. The one is completely under the control of the legislature and the other is not, because it is the creation of a contract between the State and a private individual or individuals, which can not be interfered with without violating that provision of the Constitution which preserves the obligation of contracts.

"We are, therefore, of the opinion that the resolutions adopted by the legislature of the 19th and 27th of January, 1844, appointing commissioners to compromise and settle the matters in controversy in the present case is no violation of any rights vested in the incorporated board of commissioners for common schools; nor is it a violation of that portion of the Constitution which prohibits the passage of any law for diverting the school fund, or any portion thereof, to any other use than the support and encouragement of common schools, and that the legislature had full power and authority inherent to adopt said resolutions; that it was the proper mode to appoint the commission; that the commissioners had full power and authority delegated to them to make the compromise; that it has been made in pursuance of that power and is binding and obligatory upon this court and all persons concerned, and do decree accordingly."[1] **24**, 282. *The Governor et al. v. McEwen.* 1844.

[1] See **30**, 582; **44**, 100.

Common School Fund — Investment in Capital Stock of Bank — "Perpetual Fund Clause." — NICHOLSON, J.: "The legislature intended to make, and did make, the common school fund a part of the capital of the bank. But it is insisted that under the Constitution of 1834 the legislature had no power to vest the common school fund as capital in the bank so as to divest it of its character as a trust fund. It is declared in the Constitution of 1834 that the common school fund shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation — that 'the interest of the school fund shall be inviolably appropriated to the support and encouragement of common schools,' and that 'no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools.' There is no ambiguity in this language of the Constitution. It dedicates the school fund as a perpetual fund, which is not to be diminished by legislative appropriations, but the interest thereof is to be inviolably used for the support of common schools. It is a trust fund, to be controlled and managed by the legislature, but so managed and controlled as to keep the principal undiminished, but at the same time to make interest for use in supporting and encouraging common schools." 64, 18. [1] *The State and Watson, Tr., v. Bank of Tennessee et al.* 1875.

This Clause Construed in Connection With Art. 2, Sec. 29 — Public Schools — Corporation Purposes. — COOPER, J.: "The language of this section, both in the earlier and later Constitution, plainly shows the intent of the people that the education of the children through a system of common schools should be a State purpose. And the existence of a common school fund at the time of the adoption of the Constitution of 1834 also clearly shows that the legislature, without any positive constitutional direction, had always considered education, to use the language of Judge Cooley, 'a prime object of American government.' As soon as the growth of our cities, and the increasing prosperity of the State would justify it, the legislature began to confer upon the counties and incorporated towns the power to establish and sustain, or aid in sustaining, public schools. If the State alone managed the common schools, the richer and more populous counties would bear the larger part of the burden on the entire State, which might be right enough to a certain extent, all parts of the State being interested in the education of the people. But it was obvious that the richer and more populous counties needed greater facilities of education than those afforded by the State, and ought to have the exclusive benefit of the increased taxation upon them rendered necessary for the purpose. No better mode could possibly be devised for attaining these ends than the entrusting to the

[1] See same case, art. 1, sec. 20, p. 168.

counties and the incorporated towns, as parts and agents of the State government, the power to organize, support, and control the system of public schools, within their limits, or to aid the same by taxation.

"The powers of municipal corporations are usually only parts or parcels of the powers of the State government, entrusted to them for the better security and advantage of the people. The preservation of the public peace is one of the principal duties of the State, yet a part of the duty may, and always has been, entrusted to the local municipalities. The same is true of the creation and keeping up of public roads, and of the preservation of the public health. It seemed to the legislature to follow, of course, that its power over public schools might, to a certain extent, be entrusted to its counties and incorporated towns. This was done, as we have seen, probably a third of a century ago, in some of our more populous incorporated cities. And that the establishment and support of a system of free schools in such cities was a legitimate corporation purpose, was conceded by the counsel, and taken for granted by the whole court, in the case of [1]East Tennessee University *v.* Knoxville. . . . It is suggested that the funds to be devoted to educational purposes, beyond those previously appropriated, are limited by the Constitution, art. 11, sec. 12, already quoted, to the State tax derived from polls. But the section of the Constitution referred to expressly contemplates future legislative appropriations by specially mentioning, as prospective additions to the school fund, 'all such (funds and other property of every description whatever) as shall hereafter be appropriated.' And there is not the slightest intimation in the whole section of any design to limit the legislative power in relation to common schools." 83, 642. [2]*Ballentine v. Mayor etc. of Pulaski.* 1885.

ART. 11, SEC. 13. The general assembly shall have power to enact laws for the protection and preservation of game and fish within the State, and such laws may be enacted for and applied and enforced in particular counties or geographical districts designated by the general assembly.

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[1]Art. 2, sec. 29, p. 364.

[2]See same case, art. 1, sec. 8, p. 68; art. 2, sec. 2, p. 252; art. 2, sec. 17, p. 277; art. 2, sec. 28, p. 333; art. 2, sec. 29, p. 365; art. 11, sec. 8, p. 541.

INTERMARRIAGE OF THE RACES.

ART. 11, SEC. 14. The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro to the third generation, inclusive, or their living together as man and wife, in this State, is prohibited. The legislature shall enforce this section by appropriate legislation.

The Institution of Marriage—How Regarded by Civilized Nations From the Days of Adam and Abraham to the Present Time—Relations Between State and Federal Governments—Authority of Each Over the States—Province and Duty of State and Federal Courts—State May Pass a Law Prohibiting the Intermarriage or Cohabitation of Negroes and Whites—Civil Rights Bill.—SNEED, J.: "It is the glory and boast of our written Constitution that the powers of the law-makers are restricted and defined; and while it is the legitimate and lawful province of the Supreme judicial tribunal of the Union to determine the validity of a statute assumed to have been enacted under the authority of the organic law, it is no less the prerogative of the State tribunal to interpret its own State laws, and to pronounce upon their compatibility with the supreme organic law. And to this end they may look beyond a statute of the general government which seems to collide with the law and polity of the State, to ascertain whether such statute is made in pursuance of an authority vested by the supreme organic law; for it is not every act of congress that the 'judges in every State' shall be bound by, but only such as are passed in pursuance of the authority granted by the Constitution. And this power of a State court to pronounce upon the validity of an act of congress which is made to operate upon the people, subject to the jurisdiction of said court, has been exercised from the foundation of the government, of which we have a notable illustration in the action of half a dozen State courts within the last few years in declaring the Stamp Acts of congress, so far as they changed or interfered with the rules of evidence in the State courts, to be unconstitutional and void. Until the Supreme appellate tribunal of the Union shall declare otherwise, that question is at rest in the States whose courts have so decided. The government of the United States being one of limited powers, is, therefore, supreme only to the extent of the granted powers, and all laws upon the rights, duties and subjects specially enumerated and confined to its jurisdiction are necessarily exclusive and supreme. Sims Case, 7 Cush., 729. If, therefore, a law be enacted not authorized by the enumerated or clearly implied powers, it is not in the sense of the Constitution the supreme law of the land, and the courts of the States are not bound to carry it into execution. But the Supreme court of the United States is the tribunal of last resort on all such questions, whose judgment is

conclusive and final upon the question whether an act of congress be or be not the supreme law of the land. Ableman *v.* Booth, 21 How., 519. When it is so declared, it is as much the duty of the State courts to accept and enforce it as it is their province and duty, in the first instance, to question its validity, and decline to enforce it, when in their judgment it has been enacted without authority.

"'Among the powers,' said Judge Curtis before the late amendments, 'unquestionably possessed by the States was that of determining what persons should and what persons should not be citizens; and each State must determine,' said he, 'what civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost.' Scott *v.* Sandford, 19 How., 583. In the evil days to which we have brought ourselves by our late unhappy feuds, we are too apt to forget the moorings of the law where our fathers left us. While it is our first duty to respect and obey every valid law that emanates from the law-making power of the Federal government, yet we are too prone to magnify the civic powers of a government which has so lately crushed a dozen great States by an exhibition of military power that might have defied the world, and lawyer and law-giver, court and commonwealth, to bow without question to the civic will of the victor. The Goths of ancient Germany, it is said, were accustomed to debate every important measure twice in their councils; once while drunk, that their debates might not lack vigor, and again while sober, that they might not lack discretion. Now, that we have returned to the blessed paths of soberness and peace, when human rights and human wrongs are to be vindicated and redressed by the laws of the land, and not by the logic of the bullet and bayonet, it is well to look back upon our landmarks which our fathers have set and ascertain what rights the States have not been bereft of as the result of the late unhappy civil war. And prominent and paramount among these is the provision that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and to the people. Am. 10, Const. U. S. The powers delegated to the United States, and those prohibited by it to the States, are ascertained and defined by the terms of the Constitution itself. 'Those which are to remain in the State governments,' said Mr. Madison, 'are numerous and indefinite.' The power reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberty, and properties of the people, and the internal order, improvement, and prosperity of the State.' Federalist, No. 45. Perhaps we will be unable to find embodied in a few words so correct an idea of the general powers reserved to the States as in this brief observation of one who was, without disparagement to his renowned compeers, the best authority, living or dead, upon the sense and meaning of our fundamental law.

"The congress of the United States has never, from the foundation of the government, interfered with the internal policy of the State, in regard to marriage or the other domestic relations, and we apprehend it never will. Those things have been left where the Constitution left them, and where Mr. Madison left them, to the States which control all matters 'that concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State.' But it is said that old things have passed away, and all things have become new; and that the late amendments which give freedom to the slave, and confer upon him the right of suffrage, and guarantee to him the equal protection of the law, vouchsafe to him, also, the right of intermarriage with the white race. The Fourteenth Amendment to the Constitution of the United States, or so much of it as is important to be considered here, is in the following words: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' What is called the Enforcement Act, which was passed to give effect to the provisions of the Fourteenth Amendment, as applicable to the question before us, is as follows: 'All persons within the jurisdiction of the United States, shall have the same right in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions, of every kind, and none other; any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.

"The Civil Rights Bill, passed to give effect to the Thirteenth Amendment, which gave freedom to the slaves, is substantially and almost literally the same as the foregoing. The Enforcement Bill became a law on the 31st day of May, 1870, and the Civil Rights Bill several years before. If the African, in this country, has been elevated to a perfect equality in social, as well as political, rights with the Caucasian; if that race can claim at all the right to marry and be given in marriage with the sons and daughters of our people, it must be claimed alone by virtue of the foregoing amendments and the laws enacted for their enforcement. The State, then, is forbidden from making and enforcing any law which shall abridge the privileges and immunities of citizens of the United States. It is said that the words 'rights, privileges, and immunities,' are abusively used, as if they were synonymous. The word

'rights,' is generic, common, embracing whatever may be lawfully claimed. Privileges are special rights, belonging to the individual or class, and not to the mass; properly, an exemption from some general burden, obligation or duty; a right peculiar to some individual or body. Immunities are rights of exemption only—freedom from what otherwise would be a duty or burden. Bates on Citizenship, 22. 'These privileges and immunities,' said Washington, J., 'may be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.*

"The right of the citizen of one State to pass through or reside in any other State, for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold, and dispose of property, both real and personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; to which may be added the elective franchise, as regulated and established by the laws and Constitution of the State in which it is to be exercised. Corfield *v.* Coryell, 4 Wash. C. C., 380. These are some of the privileges and immunities intended to be guaranteed to the citizen, 'subject,' says the learned judge, 'to such restraints as the government may justly prescribe for the general good of the whole.' There are many others not herein enumerated, and upon which the courts will decide as the cases arise. Conner *v.* Elliott, 18 How., 591. The right of intermarriage among the races is, in the opinion of the court, not one of them. Nor is marriage a contract, in the sense of the Constitution, which may be 'made and enforced.' It is called, in many of the books, a civil contract, for the want of a better phrase. A contract, in the sense of these enactments, is such an agreement as may be specifically enforced, like a contract to pay money or to deliver property. Marriage is a mere covenant of the will; it may be considered, while executory, a contract, the breach of which is expiated in damages; but it reposes upon the consent of the parties. If that consent is withdrawn, there is no such thing known to our law as its specific enforcement. It, therefore, differs essentially from that species of contract contemplated by the Constitution, which may be made and then enforced in the courts, and the obligation of which can not be impaired by the legislative department. In the ecclesiastical law, it is defined to be a covenant between a man and a woman, in which they mutually promise cohabitation and a continual care to promote the comfort and happiness of each other. It is an institution of God, and a very honorable state. The Saviour honored it by his presence, and at

such a solemnity wrought his first miracle. Buck Theo. Dic., 261; Heb., xiii; Gen., ii; John, ii. 'It is the civil status,' says Mr. Bishop, 'of a man and a woman, united in law for life. In the sense in which it is dealt with by a decree of divorce, it is not a contract, but one of the domestic relations. It derives both its rights and its duties from a source higher than any contract of which the parties are capable; and as to these, it is uncontrollable by any contract they can make. Although it may be formed by a contract, yet when formed it has none of the attributes of a contract, but becomes a domestic relation. And,' says he, 'it is no more a contract than a fatherhood, or sonship, or serfdom, or slavery, or apprenticeship are contracts.' 1 Bish. Mar. and Div., 10. 'Thus,' says Robertson, C. J., 'marriage, though in one sense a contract, because, being both stipulatory and consensual, it can not be valid without the spontaneous concurrence of two competent minds, is, nevertheless, *sui generis*, and, unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore, as every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of all, is regulated and controlled by the sovereign power of the State.' Maguire *v.* Maguire, 7 Dana, 181. It is said, again, to be the particular glory of the social system; and the idea that any government could, consistently with the general weal, permit this institution to become merely a matter of bargain between men and women, and not regulate it by its own power, is too absurd to require a word of refutation.' 1 Bish., 13; 2 Story's Conf. Laws, sec. 108; 1 Id., sec. 200.

"The highest and holiest duty of every government is to provide for the happiness and general welfare of its people. How and in what manner this is to be best subserved is a question for the political power; and the police power, which is inherent in all governments, is to be exercised without question. These powers, like privileges and immunities, heretofore considered in this opinion, can not well be enumerated. 'The framers of the Constitution,' said Marshall, C. J., 'did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and the instrument they have given us is not to be so construed.' Dartmouth College *v.* Woodward, 4 Wheat., 518–629. These police powers of the State extend to every conceivable subject where the good order, the domestic peace, the private happiness or public welfare of the people demand legislation. Unless that legislation is inhibited in the fundamental law, no State has acquitted itself of the duties of government without it. We hold that such legislation is not, never has been, and never should be prohibited to the States in reference to the intermarriage of the races. It has been repeatedly held by the Supreme court of the United States that a State may determine the

status of persons within its jurisdiction. Groves *v.* Slaughter, 15 Pet., 419; Moore *v.* Illinois, 14 How., 13; 11 Pet., 131; Story Const., secs. 1098, 1804, 1809. The right to regulate the institution of marriage, to classify the parties and persons who may lawfully marry, to dissolve the relation by divorce, and to impose such restraints upon the relation as the laws of God and the laws of propriety demand, has been exercised by all governments, and in all ages of the world. The discrimination as to race and people in this most important institution has been observed even from the days of the patriarchs, and even as to different people of the same race. 'Thou shalt not,' said Abraham, 'take a wife unto my son of the daughters of the Canaanites, among whom I dwell; but thou shalt go unto my country, and to my kindred, and take a wife unto my son Isaac.' Gen., xxiv.

"The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend upon an admixture of blood. A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermerge the individuality of the races as a calamity full of the saddest and gloomiest portent to the generations that are to come after us. They are among us. They were faithful as slaves, and are becoming useful and valuable as laborers. There is scarce a family in the South that has not some memory, fresh and grateful, of affection and fidelity in these people during the late sad war. These should commend them to the protection and charity of our people. The courts will protect them in the enjoyment of every civil right guaranteed to the most favored citizen, for such we understood to be the sense of the amendments. Their rights, social, civil, political, and religious, will be jealously guarded; but they must not marry or be given in marriage with the sons and daughters of our people. Such was the policy of our own legislation, as to bond and free, fifty years ago, and was at the time of the amendments in question. Such, also, were the laws of the British colonies in this country, re-enacted after the separation by the thirteen States. In Massachusetts the Colonial Act of 1707, entitled 'An Act for the better preventing of a spurious and mixed issue,' was re-enacted under the State government in 1786, forbidding the intermarraige of the black and white races, and degrading the unhappy issue of such marriage with the stain of bastardy. And long after the abolition of slavery in that State, in the carefully revised Code of 1836, this 'mark of degradation,' says Taney, C. J., 'was again impressed upon the race.' 19 How., 413. And such, indeed, we believe, was the law of every State. The congress has the same right to regulate this relation in the District of Columbia and in the territories that the States have within their own jurisdictions, and this power is at this moment being exercised in Utah in the supression of polygamy. We are of opinion that the late amendments to the

Constitution of the United States, and the laws enacted for their enforcement, do not interfere with the rights of the States, as enjoyed since the foundation of the government, to interdict improper marriages, and that the [1]Act of 1870, ch. 39, which forbids the intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation, inclusive, and their living together as man and wife, in this State, is a valid and constitutional enactment." 50, 303. *Lonas v. The State.* 1871.

ART. 11, SEC. 15. No person shall, in time of peace, be required to perform any service to the public, on any day set apart by his religion as a day of rest.

ART. 11, SEC. 16. The declaration of rights hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained, is excepted out of the general powers of the government, and shall forever remain inviolate. [Same as Const. 1834, art. 11, sec. 12. Const. 1796, art. 10, sec. 4, contained the word "annexed" instead of the word "prefixed," and also contained the words "and every other right not hereby delegated" after the word "contained" and before the word "is." Otherwise the same.]

ART. 11, SEC. 17. No county office created by the legislature shall be filled otherwise than by the people of the County court.[2]

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[1] M. & V., 3229.

[2] See art. 4, sec. 1, Cook *v.* The State, p. 391; art. 6, sec. 4, The State *v.* Glenn, p. 429; art. 7, sec. 4, Luehrman *v.* Taxing District of Shelby County, p. 473.

SCHEDULE.

Officers and Offices.

Schedule, Section 1. That no inconvenience may arise from a change of the Constitution, it is declared that the governor of the State, the members of the general assembly, and all officers elected at or after the general election of March, 1870, shall hold their offices for the terms prescribed in this Constitution.

Officers appointed by the courts shall be filled by appointment, to be made and to take effect during the first term of the court held by judges elected under this Constitution.

All other officers shall vacate their places thirty days after the day fixed for the election of their successors under this Constitution.

The secretary of the State, comptroller and treasurer shall hold their offices under the first session of the present general assembly occurring after the ratification of this Constitution, and until their successors are elected and qualified.

The officers then elected shall hold their offices until the fifteenth day of January, 1873.

Clerk and Master—Appointment Of.—Nicholson, J.: "It is obvious that the paramount object of this section of the schedule was to continue in office those holding offices when the Constitution was adopted, and to fix a limit to their continuance. Baldwin was an officer appointed by a court. By this section he was continued in office until the close of the first term of the court held by the chancellor elected under the Constitution. He was therefore clerk and master during the January term, 1871, that being the first term, and with the close of that term his office would have terminated, as the chancellor made no new appointment, but for the provision in art. 7, sec. 5, of the Constitution, which provides that every officer shall hold his office until his successor is elected or appointed, and qualified. Baldwin was therefore continued in office by the failure of the chancellor to appoint his successor at the January term, 1871, but this continuance was only to operate until his successor was appointed and qualified. By art. 6, sec. 13, of the Constitution, chancellors have the power to appoint their clerks and masters, and under this section Chancellor Nixon had the power to appoint Baldwin's successor. This power was in nowise interfered with or restricted by the first section of the schedule. That section was intended to limit the continuance of the clerk and master's office, but not intended to make it imperative on the chancellor to fill the office during that term or to deprive him of the power to do so afterwards." **54**, 415. *In the matter of Baldwin.* 1872.

Right of Officers to Continue in Office—This Clause Construed.—Nicholson, J.: "This section distinctly recognizes the right of all officers elected after the general election in March, 1870, to continue in office

for the terms prescribed in the body of the Constitution. The necessary interpretation of this language is, that any elections authorized to be held by laws existing at the March election or afterward, and before the time fixed for the first general election in August, 1870, shall not be interfered with by the Constitution, but the law authorizing them shall continue in force until they expire, and the officers so elected shall hold their offices for the terms prescribed in the Constitution. It is, therefore, clear that the election on the fourth Monday in May, 1870, was legal." **56**, 802. [1]*Brinkley v. Bedford.* 1872.

Clerk and Master.—BURTON, Sp. J., held: "The accidental fact that no Chancery court was held at Carthage after the adoption of the Constitution of 1870, until August, 1871, did not have the effect . . . to continue in office a clerk and master who had been appointed on the fourteenth day of February, 1865. But, on the contrary, the office was then vacant, and subject to be filled by the chancellor of the district at that time." **61**, 238. [2]*Gold v. Fite.* 1872.

SCHEDULE, SEC. 2. At the first election of judges under this Constitution there shall be elected six judges of the Supreme court, two from each grand division of the State, who shall hold their offices for the term herein prescribed.

In the event any vacancy shall occur in the office of either of said judges at any time after the first day of January, 1873, it shall remain unfilled and the court shall from that time be constituted of five judges.

While the court shall consist of six judges, they may sit in two sections, and may hear and determine causes in each at the same time, but not in different grand divisions at the same time. When so sitting the concurrence of two judges shall be necessary to a decision.

The attorney general and reporter for the State shall be appointed after the election and qualification of the judges of the Supreme court herein provided for.[3]

SCHEDULE, SEC. 3. Every judge and every officer of the executive department of this State, and every sheriff holding over under this Constitution, shall, within twenty days after the ratification of this Constitution is proclaimed, take an oath to support the same; and the failure of any officer to take such oath shall vacate his office.

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[1] See same case, art. 7, sec. 5, p. 475; art. 11, sec. 1, p. 504.

[2] See same case, art. 7, sec. 4, p. 472.

[3] See Perkins *v.* Scales, art. 2, sec. 2, p. 252.

STATUTES OF LIMITATIONS AND WRITS OF ERROR.

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SCHEDULE, SEC. 4. The time which has elapsed since the sixth day of May, 1861, until the first day of January, 1867, shall not be computed in any cases affected by the statutes of limitations, nor shall any writ of error be affected by such lapse of time.[1]

Done in convention at Nashville, the twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth. In testimony whereof, we have hereunto set our names.[1] [[1] Signed by all the members of the convention. See p. — for their names.]

[Amendment of 1865 Schedule, Sec. 4: "No statute of limitations shall be held to operate from and after the sixth day of May, 1861, until such time hereafter as the legislature may prescribe, nor shall any writ of error be refused or abated in any cause or suit decided since the sixth day of May, 1861, and prior to this time, by reason of any lapse of time; and in all actions for torts brought, or which may hereafter be brought in the courts of this State by attachment levied upon the property of the defendant, the court shall have power to proceed to judgment and collection of the same as upon contracts, without personal service of process upon the defendant, until the legislature may see fit to change the law in such cases."[2]]

Statute of Limitation—Right of Redemption.—SMITH, J., held: "The fourth section, chapter 10, of the Act passed the eighteenth of May, 1865, is unconstitutional and void, so far as it undertakes to authorize the redemption of land sold more than two years before the passage of this act, and which the debtor did not offer to redeem within two years after the sale. This is the general rule. . . . The exception to the rule is, where fraud prevented a redemption, or the time is extended by the parties; or, perhaps, exceptions should be allowed on account of duress, imprisonment, or overwhelming power, and the like; or when war was raging in the country of the residence of the debtor and purchaser; or on the ground that courts of equity grant relief, under many circumstances, against forfeiture, etc." **46**, 221. *Reynolds v. Baker et al.* 1869.

Writ of Error—Vested Rights.—ANDREWS, J.: "The writ of error in this cause is not within the saving of the above section. The final decree was rendered August 31, 1860; more than eight months prior to the date therein fixed. And we can not say that in cases decided prior to May 6, 1861, the bar of the statute being but partly accomplished, the time ceased to run against that writ after that date; for that would be to make the section say in effect, what it does not say in terms, and what it impliedly excludes, that the writ of error should not be refused or barred by reason of lapse of time in any cause decided within one year prior to the sixth day of May, 1861. Neither is this case provided

[1] See **48**, 278; **58**, 306; **59**, 443.

[2] See **42**, 153; **43**, 23, 299; **45**, 247; **47**, 15, 193; **64**, 18.

for by that clause of the section above quoted, which declares that 'no statute of limitations shall be held to operate from and after the sixth day of May, 1861,' etc. It is true that a proceeding by writ of error is often spoken of as being an action, or in the nature of an action. And in this view, the statute limiting the time in which such a writ may be sued out, might not inappropriately be termed a statute of limitation. But this term is not usually applied to the statutes regulating appellate proceedings, and can not have that application in the section of the schedule now under consideration. In Reynolds *v.* Baker, decided by this court at the last special term at Knoxville, the same constitutional provision was held not to be applicable to the statutes regulating the time within which land sold under execution might be redeemed; and much of the reasoning in that case will apply to the present. But the express provision made for writs of error in the same section, shows conclusively that it was not intended to embrace the statutes regulating these writs within the general provision in regard to statutes of limitation.

"On the thirtieth day of May, 1865, an [1]act was passed by the legislature which repeated the above constitutional provision, that no statute of limitation shall be held to operate from and after the sixth day of May, 1861; fixes the first day of January, 1867, as the date from which the statute shall again commence to run, and then declares: 'Nor shall any writ of error be refused or barred in any suit decided since the sixth day of May, 1861, *or within one year immediately prior to that date*, by reason of lapse of time. The statute in express terms provides for the present case, but we are compelled to hold it in its application to this case invalid. At the time of the passage of this act, the writ of error was completely barred under the existing law, and no mere legislation could bestow a new right to the writ. In regard to statutes of limitation, properly so called, it is held that when the period prescribed by statutes has already run, so as to extinguish a claim which one might have made to property in possession of another, the title to the property will be regarded as vested in the possessor. Cooley, Const. Lim., 365. A statute attempting to confer the right to an appeal or writ of error from a final decree adjudicating the right of property, after the time allowed by the previously existing law has expired, would be objectionable as an invasion of vested rights. It can not give a new right to a new party without taking away a corresponding right from the other party. Sedgw. on Const. Law, 195, 196; Angell on Lim., p. 11. In Sampeyreac *v.* United States, 7 Pet., 222, it seems to have been thought by the court that an act of congress giving the right to file a bill of review where no such right existed before, and after the time allowed for appeal had expired, was valid; but the case went off upon the point

[1]Act 1865, ch. 10, sec. 1; T. & S., 2762*a*; M. & V., 3457.

that the former decree was a nullity, being in favor of a fictitious person, and the precise question was not decided, the court holding properly, that under the Constitution of the United States, the retrospective charter of this legislation constituted no objection to it. The act of the legislature purports to confer upon one of the parties to a litigation already terminated, a right against the other party which had no existence at the time of the passage of the act. Such legislation is an attempt to confer a right, and not merely a regulation of the remedy. The result is that the writ of error in this cause was not obtained within the time limited by the law, and it must be dismissed." Thomp. Tenn. Cases, p. 274. *Trim v. McPherson.* 1869.

Statute of Limitations—Power of the Legislature to Extend.—SHIELDS, Sp. J.: "The question is as to the power to extend the time when the cause of action is already barred; and it has been uniformly held, so far as our researches have extended, that it can not be done. In the case of Woart *v.* Winnick, 3 N. H. Rep., 473, it was expressly held that an act of the legislature repealing an act of limitation was, with respect to all actions pending at the time of the repeal which were previously barred, null and void. This case, however, was decided under a provision of the Constitution of that State. But in many other cases, in the States of Massachusetts, Michigan, Arkansas, Mississippi, Pennsylvania, Iowa, Indiana, and Vermont, cited by Mr. Angell in his highly esteemed and authoritative work on Limitations of Actions at Law, the same general doctrines seem to have been held. Ang. on Lim., 22, 23, note. Although our own courts seem not to have been called upon heretofore to adjudicate this precise question, yet they have uniformly held that a claim barred by a statute of limitation is deemed in law to be extinguished and discharged (9 Yerg., 543); and, consequently, to revive it is to interfere with a vested right. In some of the cases, and also in some of the text-writers, as in Cooley, 365, the subject-matter of the controversy and of the application of the doctrine is mentioned as property; in others the rule is stated as being applicable to all demands that are barred. There can be no difference in principle whether it is a right to recover land or personal property in specie, or damages for the breach of a contract, or for a tort. We therefore hold section 4 of the Schedule of the amended Constitution of 1865, and section 4 of the Schedule of the new Constitution of 1870, and the Act of May 30, 1865, ch. 10, sec. 1, so far as by their terms and effect they authorize the institution of suits to recover on demands, whether arising *ex contractu* or *ex delicto*, that were, at the times of these several enactments and resolutions, already barred by existing laws, to be null and void." **48**, 287. *Girdner v. Stephens.* 1870.

See **54**, 342. Also p. 124, this volume.

Doctrine Adhered To.—In this case the doctrine announced in Girdner *v.* Stephens was adhered to without discussion, NICHOLSON, J., delivering the opinion of the court. **53**, 323. *Mynatt and Howell v. Hubbs.* 1871.

Lost Remedy Can Not be Revived by Constitutional Convention.—Referring to the above case of Girdner *v.* Stephens, NICHOLSON, J., said: "It was not held in that case, nor intended to be held, that there were no vested rights which could be impaired by subsequent legislation. The numerous instances in which the courts have held that vested rights might be divested by subsequent legislation, without violating the Federal Constitution, were examined and considered in preparing the opinion in that case, and they were not regarded as in conflict with the conclusion announced. Those cases (and they have been cited in this argument) establish the proposition that the prohibition of the Federal Constitution does not prevent the States, either through their conventions or legislatures, from impairing vested rights, provided always, those vested rights are not so dependent on the obligations of contracts as to render them obnoxious to the prohibition of the Federal Constitution. The remarks of Judge Cooley, at p. 369, fully sustain the conclusion in the case of Girdner *v.* Stephens, and seems to us to place the question in a light that is unanswerable. 'As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand can not have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the right is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation.'

"Why is the right, acquired by the lapse of the time prescribed for effectuating the bar of the remedy, beyond the power of legislation? Not only because of the obligation of the contract implied by law, but even more palpably because the right so acquired becomes vested as property, and it stands protected by that clause of the Federal Constitution which shields the property of every citizen from disturbance except by due process of law. By the settled law the lapse of the prescribed time not only bars the remedy, but, in the case of property, it vests a perfect title to the property, and at once comes under the protection guaranteed to the rights of property by the Constitution.

"But this result follows only from the assumption that the statute of limitations has run on unobstructed and unsuspended during the time prescribed by law. In the case before us the slaves went into the possession of the donees in December, 1861, and January, 1862. The war was prevailing when the gifts were made. The question raised by these facts was reserved in the case of Girdner *v.* Stephens, as the court in

that case held that it could judicially know that the courts were not closed in the locality where the transaction occurred. We have determined the question at the present term by holding the general proposition that as the bar operates upon the remedy, if, by the existence of civil war the remedy is suspended, by reason of the fact that the courts are not open, then and during such time as the courts are so closed the statute would be suspended." FREEMAN, J., dissented. **52**, 362. [1]*Yancy v. Yancy.* 1871.

ORDINANCE.

SECTION 1. *Be it Ordained by the Convention*, That it shall be the duty of the several officers of the State authorized by law to hold elections for members of the general assembly and other officers, to open and hold an election at the place of holding said elections in their respective counties, on the fourth Saturday in March, 1870, for the purpose of receiving the votes of such qualified voters as may desire to vote for the ratification or rejection of the Constitution recommended by this convention, and the qualification of voters in said election be the same as that required in the election of delegates to this convention.

SEC. 2. It shall be the duty of said returning officers in each county in this State to enroll the name of each voter on the poll books prepared for said eleetion, and shall deposit each ballot in the ballot boxes respectively. Each voter who wishes to ratify the new Constitution shall have written or printed on his ticket the words 'New Constitution,' or words of like import; and each voter who wishes to vote against the ratification of the new Constitution shall have written or printed on his ticket the words 'Old Constitution,' or words of like import.

SEC. 3. The election shall be held, and the judges and clerks shall be appointed as in the case of the election of the members of the general assembly; and the returning officers, in presence of the judges or inspectors, shall count the votes given for the 'New Constitution,' and of those given for the 'Old Constitution,' of which they shall keep a correct estimate in said poll books. They shall deposit the original poll books of said election with the clerks of the County courts in the respective counties; and shall, within five days after the election, make out accurate statements of the number of votes in their respective counties for or against the 'New Constitution,' and immediately forward by mail one copy of said certificates to the governor and one to the speaker of the senate. So soon as the poll books are deposited with the County court clerks, they shall certify to the president of the convention an accurate statement of the number of votes cast for or against the 'New Constitution,' as appears on said poll books; and if any of the said returning officers shall fail to make the returns herein provided for within the time required, the governor shall be authorized to send special messengers for the result of the vote in those counties whose officers have so failed to make returns.

SEC. 4. Upon the receipt of said returns it shall be the duty of the governor, speaker of the senate, and the president of this convention, or any two of them, to compare the votes cast in said election; and if it shall appear that a majority of all the votes cast for and against the new Constitution were for 'New Constitution,' it shall be the duty of the governor, speaker of the senate, and president of this convention, or any two of

[1] See same case, art. 2, sec. 2, p. 264.

them, to append to this Constitution a certificate of the result of the votes, from which time the Constitution shall be established as the Constitution of Tennessee, and the governor shall make proclamation of the result.

SEC. 5. The governor of the State is required to issue his proclamation as to the election on the fourth Saturday in March, 1870, hereto provided for.

JOHN C. BROWN, *President.*

Attest: T. E. S. RUSSWURM, *Secretary.*

The Constitution Took Effect on May 5, 1870. — DEADERICK, J.: "The ordinance of the convention prescribing the manner and time at which the question of the ratification or rejection of the Constitution should be submitted to the vote of the people of the States, as well as the qualification of the voters, by its fourth section directs that the governor, speaker of the senate, and the president of the convention, or any two of them, shall compare the votes, and if it shall appear that a majority of the votes was cast for the new Constitution, then they, or any two of them, shall append to the new Constitution a certificate of the result of the votes, from which time the Constitution shall be established, and the governor shall make proclamation of the result. Accordingly, the certificate of the result was issued on the 5th of May, 1870, and the governor did, on that day, 'declare and proclaim the result of the vote upon the ratification or rejection of the Constitution in pursuance of the fourth ordinance,' as the proclamation recites, thus attesting that the Constitution was established on the 5th of May, 1870." **68**, 233. [1]*Bilbrey v. Poston.* 1874.

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[1] See same case, art. 11, sec. 11, p. 555.

PROCLAMATION.

STATE OF TENNESSEE, EXECUTIVE DEPARTMENT,
NASHVILLE, May 5, 1870.

In pursuance of the fourth ordinance of the late constitutional convention, I have carefully examined the official returns of the election held on the twenty-sixth day of March last, for the ratification or rejection of the proposed Constitution of the State of Tennessee (except the counties of Knox, Grainger, Roane, and Overton, which returns have not been received), and find the number of votes cast for the "New Constitution" to be (98,128) ninety-eight thousand one hundred and twenty-eight, and for the "Old Constitution" (33,872) thirty-three thousand eight hundred and seventy-two, being a majority of (64,256) sixty-four thousand two hundred and fifty-six for the New Constitution.

Now, therefore, I, D. W. C. Senter, governor of the State of Tennessee, by virtue of the power and authority in me vested, do hereby declare and proclaim that the New Constitution, as submitted to the people, was ratified by them at the ballot box, on the twenty-sixth day of March last, by said majority of (64,256) sixty-four thousand two hundred and fifty-six votes.

In testimony whereof, I have hereunto subscribed my official signature, and ordered the Great Seal of the State to be affixed.

Done at the department in the city of Nashville, this fifth day of May, in the year of our Lord, one thousand eight hundred and seventy, and of the American Independence the ninety-fourth.

D. W. C. SENTER.

By the governor:

A. J. FLETCHER,
Secretary of State.

MEMBERS OF THE CONVENTION OF 1870.

JOHN C. BROWN, PRESIDENT.

JOHN ALLEN,
JESSE ARLEDGE,
HUMPHREY BATE,
JNO. BAXTER,
A. BLIZZARD,
NATHAN BRANDON,
JAMES BRITTON,
R. P. BROOKS,
NEILL S. BROWN,
JAMES S. BROWN,
T. M. BURKETT,
JOHN W. BURTON,
WM. BYRNE,
ALEX. W. CAMPBELL,
WM. BLOUNT CARTER,
Z. R. CHOWNING,
JAMES A. COFFIN,
WARREN CUMMINGS,
ROBERT P. CYPERT,
T. D. DAVENPORT,
N. V. DEADERICK,
G. G. DIBRELL,
JOS. A. MABRY,
A. G. MCDOUGAL,
MALCOM MCNABB,
MATT. MARTIN,
JOHN H. MEEKS,
THOS. C. MORRIS,
J. NETHERLAND,
A. O. P. NICHOLSON,
GEO. C. PORTER,
JAS. D. PORTER, JR.,
GEO. E. SEAY,
N. F. DOHERTY,
J. E. DROMGOOLE,
JAMES FENTRESS,
A. T. FIELDER,
P. G. FULKERSON,
JOHN A. GARDNER,
JOHN E. GARNER,
S. P. GAUT,
CHARLES A. GIBBS,
B. GORDON,
J. B. HEISKELL,
R. HENDERSON,
H. L. W. HILL,
SP'L HILL,
SAM S. HOUSE,
JNO. F. HOUSE,
T. B. IVIE,
THOMAS M. JONES,
DAVID N. KENNEDY,
D. M. KEY,
SAM J. KIRKPATRICK,
A. A. KYLE,
SAMUEL G. SHEPARD,
E. H. SHELTON,
WM. H. STEPHENS,
JOHN M. TAYLOR,
J. C. THOMPSON,
N. VANCE THOMPSON,
JAMES J. TURNER,
GEO. W. WALKER,
RICHARD WARNER, JR.
N. H. WILLIAMSON,
W. M. WRIGHT.

Attest:

T. E. S. RUSSWURM, *Secretary.*
THOS. W. JONES, *Assistant Secretary.*
W. S. KYLE, *Second Assistant Secretary.*

MISCELLANEOUS.

OBSOLETE PORTIONS OF THE FIRST TWO CONSTITUTIONS.

Schedule to Constitution of 1834.

Section 1. That no inconvenience may arise from a change of the Constitution, it is declared that all officers, civil and military, shall continue to hold their offices; and all functions appertaining to the same shall be exercised and performed according to the existing laws and Constitution until the end of the first session of the general assembly which shall sit under this Constitution, and until the government can be reorganized and put into operation under this Constitution in such manner as the first general assembly aforesaid shall prescribe, and no longer.

Sec. 2. The general assembly which shall sit after the first apportionment of representation under the new Constitution, to wit, in the year one thousand eight hundred and forty-three, shall, within the first week after the commencement of the session, designate and fix the seat of government;[1] and when so fixed it shall be removed except by the consent of two-thirds of the members of both houses of the general assembly. The first and second sessions of the general assembly under this Constitution shall be held at Nashville. See note, p. 499.

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[1] **Act Declaring Nashville the Seat of Government.**— Freeman, J.: "The legislature did, in pursuance of this section, declare as substantially adopted into the Code: 'The town of Nashville, in the county of Davidson, is the seat of the State government of this State.' And now it is insisted that if the general assembly met at any other place while Nashville remained the seat of government the laws passed by them there are void. We may say first in reference to the fact that the law was passed at Memphis, that there is nothing on the face of the law from which we can see that it was not passed at Nashville; but assuming, as perhaps we are judicially bound to do, that such was the case, then the question suggested is fairly presented, and we feel bound to decide it. The section of the schedule quoted only requires the legislature to designate and fix the seat of government, and that when so fixed it shall not be removed except by consent of two-thirds of the members of both houses of the general assembly. The fair construction of this clause is, that the permanent seat of government shall be fixed; but it certainly does not follow that upon an overriding and controlling emergency the legislature, one branch of the government only, may not assemble at another place temporarily, while that emergency lasts, without changing the permanent seat of government. Again, the presumption which must always stand till removed by clear evidence to the contrary, would be in favor of the regularity of the action of the law-making power in the State; and we would be bound, perhaps, to assume that the change of the place of meeting had been assented to as required by law, and that the seat of government had been changed by a two-thirds vote of both houses of the general assembly as required. On looking into the legislative action of the period, however, we find that in contemplation of such an emergency as did occur, a joint resolution was passed by both houses of the general assembly, on the 10th of February, 1862, authorizing a temporary change of the seat of government, and authorizing the governor by proclamation to convene the legislature, when he deemed it necessary, at the place determined upon as the temporary seat of government. See [1]Acts of the Thirty-fourth General Assembly for 1861 and 1862, pamphlet, p. 82. We might presume, if we did not know it judicially, as part of the public and well-known history of the country, that the legislature did meet in pursuance of this joint resolution." **54**, 698. *Frierson's Ex'rs. v. Gen'l. Assembly Pres. Church.* 1872.

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[1] M. & V., 79.

Sec. 3. Until a land office shall be opened so as to enable the citizens south and west of the congressional reservation line to obtain titles upon their claims of occupancy, those who hold lands by virtue of such claims shall be eligible to serve in all capacities where a freehold is, by the law of the State, made a requisite qualification.

Done in convention at Nashville, this the thirtieth (30th) day of August, one thousand eight hundred and thirty-four, and of the independence of the United States of America the fifty-ninth.

William B. Carter, *President.*

William K. Hill, *Secretary.*

[The ordinance following the Schedule to the Constitution of 1834 and providing a method of voting on the adoption of that instrument, also making an apportionment of senators and representatives is omitted because unimportant.]

MEMBERS OF THE CONVENTION OF 1834.

Carter—William B. Carter.
Washington—Matthew Stephenson.
Sullivan—Abraham McClellan.
Greene—Robert J. McKinney.
Hawkins—John A. McKinney.
Jefferson, Grainger, Claiborne, Campbell—Calloway Hodges, Gray Garrett, Richard Bradshaw.
Cocke, Sevier—William C. Roadman.
Knox—Joseph A. Mabry.
Blount—James Gillespie.
Monroe—Bradley Kimbrough.
McMinn—John Neal.
Roane—James I. Greene.
Anderson, Morgan—John Whitson.
Rhea, Hamilton—William T. Senter.
Bledsoe, Marion—John Kelly.
Washington, Greene, Sevier, Cocke, Monroe, Blount, McMinn—John McGaughey.
Overton, Fentress—Hugh C. Armstrong.
Jackson—James W. Smith.
White—Richard Nelson.
Warren—Isaac Hill.
Franklin—George W. Richardson.
Warren, Franklin—William C. Smart.
Smith, Sumner—John J. White, Robert Allen, Isaac Walton.
Wilson—Burchett Douglass, Robert M. Burton.
Rutherford—William Ledbetter, Henry Ridley.
Bedford—Joseph Kincaid, Jonathan Webster.
Lincoln, Giles—James Fulton, A. A. Kincannon, Thomas C. Porter.
Davidson—Francis B. Fogg, Robert Weakley.
Williamson—Newton Cannon, William G. Childress.
Maury—Terry H. Cahal, Robert L. Cobb.
Robertson—Richard Cheatham.
Montgomery—Willie Blount.
Dickson, Stewart, Humphreys—James Gray, John Montgomery.
Hickman, Wayne, Lawrence—Bolling Gordon, Henry Sharp.
Henry—Peter Kendall.
Carroll—Ennis Ury.
Henderson—John Purdy.
Hardin, Perry, McNairy—James Scott, McLin Cross.
Madison—Adam Huntsman.
Hardeman—Julius C. N. Robertson.
Fayette—West Humphries.
Shelby—Adam R. Alexander.
Gibson, Dyer—Nelson I. Hope.
Weakley, Obion—G. W. L. Marr.
Haywood, Tipton—William H. Loving.

SCHEDULE TO CONSTITUTION OF 1796.

SECTION 1. That no inconvenience may arise from a change of the temporary to a permanent State government, it is declared that all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place in the administration of government.

SEC. 2. All fines, penalties, and forfeitures due and owing to the territory of the United States of America south of the river Ohio shall inure to the use of the State. All bonds for performance, executed to the government of the said territory, shall be and pass over to the governor of this State and his successors in office, for the use of the State, or by him or them respectively, to be assigned over to the use of those concerned, as the case may be.

SEC. 3. The governor, secretary, judges, and brigadiers general, have a right, by virtue of their appointments under the authority of the United States, to continue in the exercise of the duties of their respective offices in their several departments until the said officers are superseded under the authority of this Constitution.

SEC. 4. All officers, civil and military, who have been appointed by the governor, shall continue to exercise their respective offices until the second Monday in June, and until their successors in office shall be appointed under the authority of this Constitution, and duly qualified.

SEC. 5. The governor shall make use of his private seal until a State seal shall be provided.

SEC. 6. Until the first enumeration shall be made, as directed in the second section of the first article of this Constitution, the several counties shall be respectively entitled to elect one senator and two representatives; provided, that no new county shall be entitled to separate representation previous to taking the enumeration.

SEC. 7. That the next election for representatives and other officers to be held for the county of Tennessee shall be held at the house of William Miles.

SEC. 8. Until a land office shall be opened so as to enable the citizens south of French Broad and Holston, between the rivers Tennessee and Big Pigeon, to obtain titles upon their claims of occupancy and pre-emption, those who hold land by virtue of such claims shall be eligible to serve in all capacities where a freehold is by this Constitution made a requisite qualification.[1]

Done in convention at Knoxville, by unanimous consent, on the sixth day of February, in the year of our Lord one thousand seven hundred and ninety-six, and of the independence of the United States of America the twentieth.

In testimony whereof, we have hereunto subscribed our names.

WILLIAM BLOUNT, *President*.

WILLIAM MACLIN, *Secretary*.

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[1] See Shields *v.* Walker, note to art. 1, sec. 31, p. 241.

MEMBERS OF THE CONVENTION OF 1796.

Blount County—David Craig, James Greenaway, Joseph Black, Samuel Glass, James Houston.
Davidson County—John McNairy, Andrew Jackson, James Robertson, Thomas Hardeman, Joel Lewis.
Greene County—Samuel Frazier, Stephen Brooks, William Rankin, John Galbreath, Elisha Baker.
Hawkins County—James Berry, Thomas Henderson, Joseph McMinn, William Cocke, Richard Mitchell.
Jefferson County—Alexander Ontlaw, Joseph Anderson, George Doherty, William Roddye, Archibald Roane.
Knox County—William Blount, James White, Charles McClung, John Adair, John Crawford.
Sullivan County—George Rutledge, William C. C. Claiborne, John Shelby, Jr., John Rhea, Richard Gammon.
Sevier County—Peter Bryan, Samuel Wear, Spencer Clark, John Clack, Thomas Buckingham.
Tennessee County—Thomas Johnston, James Ford, William Fort, Robert Prince, William Prince.
Washington County—Landon Carter, John Tipton, Leroy Taylor, James Stuart, Samuel Handley.
Sumner County—D. Shelby, Isaac Walton, W. Donglass, Edward Donglass, Daniel Smith.

SCHEDULE AND RESOLUTIONS

Adopted by the Mass Meeting of Union Men Which Was Held in 1865, and Which Amended the Constitution of 1834.

For section 1, see art. 1, sec. 34, p. 242.

Sec. 2. "The declaration of independence and ordinance dissolving the federal relations between the State of Tennessee and the United States of America," passed and promulgated by the legislature of Tennessee on the 6th day of May, 1861, by which the State was declared separated from the Federal Union, and all laws and ordinances by which Tennessee became a member of the Federal Union annulled and abrogated, was in like manner an act of treason and usurpation, unconstitutional, null and void.[1]

[1] See **42**, 1; **54**, 697.

Sec. 3. The convention, agreement and military leagues entered into by the commissioners of the so-called Confederate States of America, made May 7, 1861, and on the same day ratified and confirmed by the legislature, was an act of treason, usurpation, unconstitutional, null and void.

For section 4 see section 4 of schedule to Constitution of 1870, p. 576.

Sec. 5. All laws and ordinances and resolutions, as well as all acts done in pursuance thereof, under the authority of the usurped State government after the declared independence of the State of Tennessee, on or after the sixth day of May, 1861, were unconstitutional, null and void, from the beginning; *Provided*, That this section shall not be construed as to affect any judicial decisions made by the State courts held at times differing from those provided by law prior to May 6, 1861; said judicial decisions being made pursuant to the laws of the State of Tennessee enacted previous to said date, and between parties present in court and litigating their rights.[1]

[1] See **42**, 171, 609; **43**, 214; **45**, 176; **64**, 18.

Sec. 6. All laws, ordinances, and resolutions of the usurped State government, passed on or after the sixth day of May, 1861, providing for the issuance of State bonds, also all notes of the Bank of Tennessee, or any of its branches, issued on or after the sixth day of May, 1861, and all debts created or contracted in the name of the State by said authority, are unconstitutional, null and void; and no legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes.[1]

[1] **45**, 247; **49**, 481; **64**, 18.

Sec. 7. All civil and military officers which have been or may hereafter be appointed by the acting governor of the State are hereby ratified and affirmed, and they shall continue to hold and exercise the functions of their respective offices until their successors shall be elected or appointed and qualified as by the laws and Constitutions of the State and United States.[1]

[1] **43**, 565; **45**, 590,429; **48**, 767.

Sec. 8. That the proposed amendments to the Constitution and the schedule thereto be submitted to the people at the ballot box on the twenty-second day of February next, and that upon the adoption thereof by the people, an election shall be held on the fourth day of March next, for governor and members of the legislature, the latter to be voted for by general ticket, upon the basis prescribed in the act apportioning representation in the State, passed on the nineteenth day of February, 1852, to assemble at the capitol on the first Monday in April next, said officers to continue in office until their successors shall be elected and qualified under the regular biennial election of 1867; *Provided*, That said apportionment be so modified as to give to the counties of Johnson, Carter, Campbell, Anderson, Union, Sevier, Macon, and Hancock, each one member; and the district composed of the counties of Fentress, Morgan, Scott, and Cumberland one additional member in the house of representatives.[1]

For section 9 see art. 4, sec. 1, p. 401.

[1] See **42**, 1

RESOLUTIONS.

Resolved, That at the election in February those in favor of the foregoing amendments and schedule shall deposit a ballot, on which shall be written "Ratification," and those who are opposed shall deposit a ballot on which shall be written "Rejection."

Resolved, That when the above amendments to the Constitution of the State of Tennessee shall be submitted to the people of the State for their ratification or rejection, and that the first election held under said Constitution as amended, if ratified by the people, no person shall be permitted to vote unless he first takes the following oath at the polls; and the name of each voter shall be written upon the back of his ticket, and it shall be the duty of the judges and clerks of said election to preserve said tickets and file them with the clerks of the County courts of their respective counties for future reference; *Provided*, That this oath shall not be required of the citizens who are well known to the judges to have been unconditional Union men; *Provided, also*, That voters otherwise qualified may vote within any county of the State, and, if in the military service, wherever they may be on the day of election; and that the commanding officer of each regiment, battalion, detachment, battery or hospital is empowered to hold such election:

OATH.

I solemnly swear that I will henceforth support the Constitution of the United States and defend it against the assaults of all enemies; that I am an active friend of the government of the United States and the enemy of the so-called Confederate States; that I ardently desire the suppression of the present rebellion against the government of the United States; that I sincerely rejoice in the triumph of the armies and navies of the United States and in the defeat and overthrow of the armies, navies and of all armed combinations in the so-called Confederate States; that I will cordially oppose all armistices or negotiations for peace with rebels and arms until the Constitution of the United States, and all laws and proclamations made in pursuance thereof, shall be established over all the people of every State and territory embraced within the National Union; and that I will heartily aid and assist the loyal people in whatever measure may be adopted for the attainment of those ends; and, further, that I take this oath freely and voluntarily and without mental reservation, so help me God!

Resolved, That the returns of the election shall be made to the secretary of the State, and the result be declared by the proclamation to the acting governor.

Resolved, That the convention do nominate and offer to the people a candidate for governor, and that the delegates from the several senatorial and representative districts be requested to nominate and present to the convention candidates for their respective districts to be placed upon the general legislative ticket; *Provided*, If the Union people of any district shall desire to make another selection, that they have the opportunity to do so.

Resolved, That it shall be the duty of the executive committee to fill all vacancies that may occur in the list of candidates and officers for holding elections solicited by the convention.

Resolved, That the names of such as may be selected shall be forwarded to the chairman at Nashville on or before the tenth day of February next, when the chairman shall publish the complete list in the papers of the State.

The names of the very patriotic gentlemen of which this meeting was composed have not, to my knowledge, been preserved. May they rest in peace.

PART SECOND.

CONTAINING

THE

CONSTITUTION OF THE UNITED STATES,

OPINIONS

OF

THE SUPREME COURT OF TENNESSEE

RELATING THERETO

AND

THE DECLARATION OF INDEPENDENCE.

Constitution of the United States.

PREAMBLE.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

OF THE LEGISLATIVE POWER.

Article 1, Section 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

Art. 1, Sec. 2. The house of representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

Art. 1, Sec. 3. The senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof for six years, and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

ART. 1, SEC. 4. The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators. The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

ART. 1, SEC. 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Each house may determine the rule of its proceedings, and punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

ART. 1, SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

ART. 1, SEC. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate shall, before it becomes a law, be presented to the president of the United States. If he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the objections to the other house, by which it shall likewise be considered; and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on the question of adjournment), shall be presented to the president of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

POWERS OF CONGRESS.

ART. 1, SEC. 8. The congress shall have power—

To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and among the Indian tribes;

See page 381.

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and to fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish postoffices and postroads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war; grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Patent Rights — Federal Action Conclusive. — FREEMAN, J., held: "The Constitution of the United States having conferred upon the Federal government the right to grant to inventors the exclusive right for a limited time to their discoveries, a patent is conclusive of its own validity, and a State court can not go behind it." 58, 87. *Cowan v. Mitchell.* 1872.

Patent Right — Sale of — Not Subject to License Tax. — FREEMAN, J.: "The only question in the case is the right of the State to impose a license or privilege tax on a sale of such right. Congress, under the Constitution of the United States, by art. 1, sec. 8, has conferred on it the power 'to promote the progress of science and the useful arts by securing to authors and inventors the exclusive right to their respective writings and discoveries.' This power has been exercised by the enactment of the laws under which this patent was granted. To use the language of Judge Swayne in the case of Wooten *v.* Barker, 5 Reporter, 260, 'congress has not only fixed the manner in which a patent may be obtained, but has prescribed the manner in which it may be sold, and has imposed penalties for the infringement thereof. The national government has, therefore, made the patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by the State that will impair the right to make, use, or vend

any patent, or the right to assign the patent, or any part of it, is forbidden by the highest organic law.'

"If this principle be correct, and we see no cause to doubt it, in the case of sale of a right to make or manufacture the patented article, then it seems clear the statute of the State requiring a license in order to the sale of the patent, must be held void, and in violation of the Constitution of the United States and laws made in pursuance thereof. If the State can forbid the use and enjoyment of the right granted, except on terms of paying for the privilege the sum of ten dollars, she may as well exact ten hundred, or forbid it entirely. In this way the privilege granted may be rendered valueless, and the right purchased from the United States be entirely destroyed for all practical purposes. We hold this can not be done, and the right of the patentee to sell or assign his privilege granted to him by the United States for the period fixed in his letters patent is beyond State control or regulation." **71**, 223. *The State et al. v. Butler.* 1879.

Privilege Tax on Steamboat Agents and Others.— FREEMAN, J., held: "The Act of the legislature of 1876, ch. 84, providing means for the local government of the 'taxing district,' which provides in sec. 7, sub-sec. 36, 'that steamboat agents and the agents of railroad companies, other than the proper officers of railroads terminating at the taxing district, shall pay a privilege tax of $25 per annum,' is not a regulation of commerce between the States, and is not therefore in violation of the Constitution of the United States." **72**, 219. *Lightburne et al. v. Taxing District.* 1880.

Interstate Commerce—Privilege Tax on Sample-Sellers.— LURTON, J., held: "The Revenue Act (1891), ch. 25 (ex. session), imposing privilege tax on persons selling goods to consumers by sample, and declaring it a misdemeanor to do so without payment of this tax, is invalid as an unlawful regulation of interstate commerce in so far as it shall be applied to persons not residents of this State, who, as agents or drummers, take orders in this State from consumers for the sale of the goods of their non-resident principal situated outside the State—the orders to be sent to such non-resident seller and the goods forwarded by him, in compliance with their terms, to the buyer." **91**. *Hurford v. The State.* 1892.

See, also, **44**, 147; **50**, 147; **59**, 67.

ART. I, SEC. 9. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinafter directed to be taken.

No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign State.

PROHIBITIONS OF STATE POWERS.

ART. 1, SEC. 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

See pages 124, 169, 184, 187, 193, 381, 555, 578, 579.

No State shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No State shall, without the consent of the congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or contract with another State, or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

Redemption — Tender of Money to Redeem Must Be in Gold and Silver. — GREEN, J., held: "The purchaser is the legal owner of the land sold under execution, subject to the equitable right of the debtor to repurchase it upon the terms specified in the act, and the condition must be strictly performed by the day; and, as, by the Constitution of the United States nothing but gold and silver coin is a legal tender, a tender in bank notes of the bank of the United States, if objected to for that reason, although equal to coin, will not be good." **16**, 242. *Lowry v. McGhee et al.* 1835.

Bills of Credit on Faith of Railroad Corporation Only. — "The W. & A. Railroad Company, a corporation created by an act of the legislature of Georgia, and of which Georgia was the exclusive proprietor, was authorized to emit *change bills* to the amount of $200,000, redeemable in

current bank notes when presented in sums of $5 and upwards; and for the redemption of these bills the W. & A. Railroad, its fixtures, property and revenues, together with the faith of the State, were pledged, and said bills were receivable in payment of taxes and all other dues of the State and of the W. & A. Railroad Company." TURNEY, J., held: "The change bills having been emitted on a pledge of the W. & A. Railroad, its fixtures, property and revenues for their redemption, and not exclusively on the faith of the State of Georgia, are not bills of credit within the meaning of the Constitution of the United States." **53**, 408. *W. & A. R. R. Co. v. Taylor.* 1871.

See also **16**, 243; **43**, 157.

Bill of Credit Defined.—SNEED, J.: "The special characteristic of a bill of credit issued by a State, as defined by the Supreme court of the United States, is, that it is a bill drawn and resting merely on the credit of the State, as contradistinguished from a fund constituted or pledged for the payment of the bill. Briscoe *v.* Bank of Kentucky, 11 Pet., 314. It must be intended to circulate as money. But it must issue solely upon the credit of the State, and upon the faith and credit of no specific fund constituted for its redemption. Darrington *v.* State of Alabama, 13 How., 16; Craig *v.* State of Missouri, 4 Pet., 431, *et seq.* The currency in question, then, is not based on the general credit of the State of Mississippi, but a particular fund has been set apart specially for its payment, and this distinguishes it from the bills of credit which lie under the ban of the organic law." **63**, 62. *Gowen v. Shute.* 1874.

ARTICLE II.

OF THE EXECUTIVE.

ARTICLE 2, SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and together with the vice president, chosen for the same time, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.[1]

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[1] This clause is modified by the 12th amendment.

[1] [The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and the house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority and have an equal number of votes, then the house of

The congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation or inability both of the president and vice president, declaring what officer shall then act as president; and such officer shall act accordingly until the disability be removed or a president shall be elected. The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:

I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States.

APPOINTMENTS BY THE PRESIDENT.

ART. 2, SEC. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

Extension of Criminal Law Over Cherokee Nation.—CATRON, J., and GREEN, J., held: "The Act of 1833, 16, extending the criminal laws of

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representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list the said house shall, in like manner, choose the president. But in choosing the president the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice president.[1]]

the State so as to give jurisdiction to the courts of the State over the crimes of murder, rape, or larceny committed within the Indian Territory by any Cherokee Indian residing therein, is constitutional." PECK, J., dissented. 16, 257. [1]*The State v. Foreman.* 1835.

ART. 2, SEC. 3. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. The president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

See page 403.

ARTICLE III.

OF THE JUDICIARY.

ARTICLE 3, SECTION 1. The judicial power of the United States shall be vested in one Suprem court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

EXTENT OF FEDERAL JUDICIAL POWER.

ART. 3, SEC. 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects.

See page 85.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme court shall have original jurisdiction. In all the other cases before mentioned the Supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

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[1] NOTE OF COOPER, EDITOR.—"The decision in this case was made by two judges against one, each of the judges constituting the majority assigning different reasons for his faith. 'The case,' says Mr. Meigs, Dig., sec. 450, 'may be read with profit by any one who desires to acquaint himself with the history and progress of legislation in reference to the Indian tribes, the former masters of the country.'"

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the congress may by law have directed.

Jurisdiction of State and Federal Courts.—ROANE, J., held: "The State judiciary can not assume, nor can the United States coerce it, to exercise any judicial powers but those sanctioned by the laws and Constitution of the State. But if congress vest the jurisdiction of violations of their laws in the State courts, and this jurisdiction is within the Constitution and laws of the State, the defendant can not object the want of jurisdiction. Thus, a judgment in the Circuit court for a penalty incurred by selling liquor without license, under the act of congress of 1813, 38, 2, is valid; for the State courts have jurisdiction, not merely by the act itself, but by our Constitution and laws, which give the Circuit court jurisdiction of all pleas personal, of which character is a forfeiture under the act." (Contra, United States *v.* Lathrop, 17 Johns., 4, 261. PLATT, J., dissenting, on the same act of congress.) **4**, 145. *Hartley v. United States.* 1816.

Act of Congress Taxing Suits in State Courts.—HAWKINS, J., held: "The act of congress, passed the thirtieth of June, 1864, provided that 'on and after the first day of August, 1864, there shall be levied and paid upon each writ, or other original process by which any suit is commenced in any court of record, either in law or in equity, the sum of fifty cents.' Held, that the courts of the State do not exist by the authority of the United States, or by its permission, and are not objects over which its sovereign power extends, except, perhaps, for the purpose of protection. It does not possess over them even the incidental power of taxation. The act is, therefore, invalid, and not binding upon the courts of this State." **43**, 325. *Union Bank v. Hill et al.* 1866.

Suits Between Citizens of Different States—Comity of States.—MCFARLAND, J., held: "A bill may be filed in the courts of this State by creditors, who are also heirs, living in Georgia, against the executor or administrator of the estate under which they claim, 'for an account of the funds, etc., and upon the exhaustion of the personalty that the lands be sold to satisfy their recovery, etc.' And this may be done notwithstanding enough property unencumbered and subject to complainants' demand, though they have not exhausted such remedy first, belonging to the estate is located in their own State. That the property in this State was disposed of by will, and the testator died intestate as to that in Georgia, will not change the result." **67**, 366. *Bird v. Key.* 1875.

ART. 3, SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

RECORDS AND JUDICIAL PROCEEDINGS.

MISCELLANEOUS PROVISIONS.

ARTICLE 4, SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Record of Judgment in Another State.—WHITE, J.: "I doubt whether the Constitution ever intended to vest congress with a power to determine what effect the judgment should have in the State to which it is sent. It seems to me probable it intended that congress should have the power to point out the effect of the authentication which they might prescribe; because, in the preceding sentence it is said, 'full faith and credit shall be given to the public acts, records and judicial proceedings of other States—congress may prescribe the mode of proof and the effect thereof.' If congress have the power of declaring the effect of the judgment, why not the power of declaring the effect of a legislative act? Would not this have been a most dangerous power to vest in congress? I can hardly believe that the framers of the Constitution intended to vest it. But there would be much reason to vest congress with a power of prescribing the mode of authenticating these documents and declaring the effect of the authentication when made. The mode would then be uniform throughout the States, and the courts of each would be compelled to receive the record as evidence that such a judgment was in fact rendered; and still, upon general principles, the defendant be left at liberty to inquire into the subject-matter of that judgment, and, if he could satisfy the court that no such judgment ought to have been given, the court could refuse with propriety to give it any effect to the prejudice of the defendant." 3, 429. *Winchester v. Evans.* 1813.

Suit Brought Upon Record of Judgment From Virginia—Conflict of Laws—Limitations—Ex Post Facto Laws—Law of the Forum.—REESE, J.: "An action of debt upon the record[1] of a judgment obtained in Vir-

[1] See Code 1858, 2783; T. & S., 2783; M. & V., 3480.

ginia was brought by the defendants in error against the plaintiff. The latter, among other things, pleaded a statute of Virginia, which limits the right to bring an action of debt or *scire facias* upon a judgment to the term of ten years after its registration. To this plea a demurrer was filed, which the Circuit court sustained; and whether the Circuit court in that respect erred is the question before us. The counsel for the plea admits that in general, in cases of contract, defenses arising from matters *ex post facto* are governed by the law of the forum. And with regard to statutes of limitations especially there can be no doubt, and it has not been here controverted but that they are strictly questions affecting the remedy, and not questions upon the merits. And in such cases, it is said by an eminent jurist to have become a formulary in international jurisprudence that all suits must be brought within the period prescribed by the local law, otherwise the suit will be barred. Story's Conflict of Laws, sec. 577.

"But it is insisted that this suit, having been founded upon a judgment rendered in one of the States of this Union, is subject under the Constitution and laws of the United States to the same defenses arising upon matters *ex post facto* and affecting the remedy merely to which it would have been subject if brought in the State where the judgment was rendered. The first section of the fourth article of our Federal Constitution provides that 'full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State. And the congress may, by general laws, prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof;' and, accordingly, congress prescribed the manner of proof and provided that records and judicial proceedings shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which the said records are or shall be taken. And here at once it may be asked, if when, in a suit brought upon this Virginia judgment, we give conclusive effect to the record by again rendering judgment thereon, it can be pretended that we have withheld faith or credit from a record or judicial proceeding of that State because we refuse to apply an *ex post facto* defense, affecting not the validity or conclusiveness of the judgment, but the remedy merely, but which would have been enforced if the suit had been brought in Virginia? The very statement shows that here is no defect in faith and credit, or conclusiveness of effect, as to the record from Virginia; but the real complaint would be that our own *lex fori*, as to the remedy, should not cease to operate in favor of the local remedy of Virginia. If this could be done, it would follow, as a consequence, that the local remedy prescribed by the Virginia statute would, in that State, cease to operate whenever a suit might be brought there upon a judgment to recover in any other State

—a consequence without and beyond the scope of the words or intention of the Constitution and act of congress; a consequence injuriously affecting the power of the States, each for itself, to impose statutes on all for repose, and founded upon a policy alike salutary and enlightened.

"But it is said that, in the case of Hampton *v.* McConnell, 3 Wheaton, 234, and the case of Miles *v.* Duryee, 7 Cranch, 481, the Supreme court of the United States determined that whatever pleas would be good to a suit brought upon a judgment in the State where it was originally rendered, and none others can be pleaded in any other court of the United States. But a reference to those cases will prove that this general language relates to pleas affecting the validity and conclusive effect of a judgment, *qua* judgment. But in the cases themselves, or in the words of the court, there was nothing relative to the question of an *ex post facto* defense or plea affecting the remedy only, the judgment itself being taken as valid and conclusive. Upon the whole, we think the judgment of the Circuit court is correct, and must be affirmed." **19**, 42. *Estes v. Kyle.* 1838.

Judicial Record From Other States — Lis Pendens. — CARUTHERS, J., held: "The clause of the Federal Constitution which requires that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,' does not mean that all the effects and consequences of a litigation in one State shall follow the subject-matter thereof into another. It has no reference to the doctrine of *lis pendens*, nor is there any recognized comity between the States of this Union which would authorize such an interpretation." **36**, 673. *Shelton v. Johnson.* 1857.

Records and Judicial Proceedings From Other States. — DEADERICK, J.: "The Constitution of the United States declares: 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' Art. 4, sec. 1. Pursuant to this authority, congress enacted: 'That the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in any court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.' Act of twenty-sixth of May, 1790. If, therefore, the judgment in this case is a valid judgment, which the court in Mississippi had jurisdiction to pronounce, it is equally valid and binding here. . . . When a judgment from another State is sought to be enforced in the courts of this State, it is competent for our tribunals, upon a plea of *nul tiel* record, to determine whether the court rendering the judgment sought to be enforced had jurisdiction of the person

against whom the judgment was rendered, and of the subject-matter of this suit." **59**, 301. *Barrett v. Oppenheimer.* 1873.

Judgment in Another State.—FREEMAN, J.: "By art. 4, sec. 1, of the Constitution of the United States it is provided that full faith and credit shall be given in each State to the public records and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. By the act of congress, in pursuance of the above clause of the Constitution, it is provided, after giving the forms as to authentication, etc., 'and said record or judicial proceedings shall have the same faith and credit given them in any court of the United States as they have by law or usage in the courts of the State whence the said records are or shall be taken.' Under these provisions it is settled that if the court rendering the judgment had jurisdiction of the person and subject-matter, and the judgment was valid in such State, then it was valid in this State. See 5 Yer., 83; Estes *v.* Kyle; 2 Am. L. Cases, last ed., 617–8, and authorities. The apparent exception to this principle is that if no service of process was had, and judgment taken against a citizen of another State, in pursuance of a regulation or law of the State, it would not have this conclusive effect, as the State could not bind by the laws citizens of other States. See Brown *v.* Brown & McCulloch, 2 Sneed, 435. But while all this may be true, it is, we think, a sound principle, as held by this court in Coffer *v.* Neely, 2 Heis., 304. Such judgments may be impeached for fraud on the part of the party obtaining them, but this must be done on the same grounds as would be required to enjoin a judgment of one of our own courts." **65**, 381. *Turley v. Taylor.* 1873.

Judgment of Probate Court of Another State.—CALDWELL, J., held: "Judgment of Probate court of another State confirming settlement of executors' accounts and discharging them, or declaring aggregate balance in their hands, and ordering in general terms its distribution according to the testator's will and the law of the case, is a judicial proceeding entitled to full faith and credit and conclusive upon all the parties when brought in question in any of the courts of this State, if the Probate court had jurisdiction of the subject-matter and the parties." **90**, 416. *Fitzsimmons v. Johnson.* 1891.

Judgment of Justices in Other States.—WM. M. SMITH, Sp. J., held: "The case of Jourolman *v.* Massengill, 86 Tenn., 81, determining that, under the Act of 1832 (Code, sec. 4283), one person may convey property in trust for the benefit of another, and so limit and restrict it as to exempt it from the debts of the beneficiary thereafter created, does not authorize the creation of such a trust by a person for his own benefit." **94**, 721. *Menkin v. Brinkley*, 1895.

See also **32**, 187.

CITIZENS OF DIFFERENT STATES.

ART. 4, SEC. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Suits in Courts of This State Between Citizens of Another State — Construction of this Clause. — The question in this case was whether a citizen of Pennsylvania could commence a suit, by original attachment, against another citizen of Pennsylvania, in the courts of this State, under the Act of 1794, ch. 1, sec. 21. (Hay. Rep., p. 183; H. & C., vol. 1, p. 12; Code 1858, 3455; T. & S., 3459; M. & V., 4192.) "It was argued that the distinctions in the statute, drawn between citizens of this State and citizens of any other State, were against the Constitution of the United States; for by that it is provided, art. 4, sec. 2, 'that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. And that, therefore, the legislature of Tennessee were not authorized to pass any statute showing a favor to her own citizens not extended to the citizens of any other State.'"

OVERTON, J., said: "The act of assembly is plain, express, and can not be misunderstood; it evidently limits the commencing of a suit, by original attachment, to citizens of this State, or against citizens of this State; and never can operate where both parties are non-residents. The Constitution of the United States is not incompatible with this act of assembly. The object of the Constitution was to secure to the citizens of every State an equal administration of justice as it regarded their essential rights, either of property or person, by the courts of every State; and was not at all intended to interfere with the mode of prosecuting those rights. This seems to have been the understanding of several States, as some of them have passed such discriminating laws; for instance, in Kentucky, a non-resident is compelled to give security for costs before he can commence a suit of any description, whereas the citizens of the State are under no such necessity. The constitutionality of such laws has not been questioned by any adjudicated case within my knowledge."

WHYTE, J., concurred: "I admit that the legislature of Tennessee has no right to pass a law violating the provisions of the Constitution of the United States, but the clause in the statute now under discussion is nohow violative of that instrument. It was alone the object of the

framers of the Constitution, by inserting the section which has been relied upon by the counsel for the plaintiff to secure the administration of impartial justice when the cause got into court, alike to the non-resident and to the citizen. It requires only for instance, that it shall be necessary to produce the same evidence in order to support an action by a citizen, as if it had been brought by an inhabitant of another State, but it never meant to disturb the local policy of the several States as to the mode of commencing actions."

On a subsequent day, in delivering the opinion of the court, WHYTE, J., said: "We believe the clause in the Constitution was not designed to affect cases of this kind. Suppose the State legislature to say that a citizen plaintiff when commencing a suit need not give security for costs, but that a plaintiff, who was a citizen of another State, should, or that a citizen defendant should be summoned, and that a defendant who was not a citizen should be compelled to give special bail to the action, would these provisions be inconsistent with the Constitution? It is conceived not. The States, it seems to us, are still left at liberty to prescribe the mode of commencing and conducting suits in their own courts, and that if they provide extraordinary remedies for their own citizens in extraordinary cases, it will not from thence follow that citizens of other States can claim them likewise; they are still left at liberty to pursue their debtors in the ordinary way where they can be found. It seems to us most probable that this clause in the Constitution was intended to compel the general government to extend the same privileges and immunities to the citizens of every State, and not to permit that government to grant privileges or immunities to citizens of some of the States, and withhold them from those of others; and that it was never designed to interfere with the local policy of the State governments as to their own citizens." **3**, 50. *Kincaid v. Francis.* 1812.

Bail in a Criminal Case Released by the Surrender of Principal by the Governor Upon a Requisition From Another State.—TURLEY, J., held: "It is a good defense to a *scire facias* against bill, in a criminal case upon a forfeited recognizance, that, between the date of entering into the recognizance and the time fixed for the appearance of the principal, the governor of the State had surrendered the principal to the authorities of another State upon the requisition of the governor of that State, and that the principal was still in jail in that State on a charge of murder." **21**, 259. *The State v. Allen.* 1840.

See, also, **11**, 387.

ART. 4, SEC. 3. New States may be admitted by the congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

ART. 4, SEC. 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened), against domestic violence.

See page 396, and **43** Tenn., page 562.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

See page 155.

The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEORGE WASHINGTON, *President*.

Attest: WILLIAM JACKSON, *Secretary*.

AMENDMENTS TO THE CONSTITUTION,

PROPOSED BY CONGRESS AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

ARTICLE I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

ART. II. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

See pages 231, 234.

ART. III. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ART. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

See page 23.

ART. V. No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

See pages 9, 43, 63, 90, 99, 107, 208.

ART. VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

See page 85.

ART. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ART. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ART. IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ART. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

See page 568.

ART. XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ART. XII. The electors shall meet in their respective States and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

ART. XIII, SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.[1]

See page 569.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

RESTRICTIONS OF STATE POWERS.

ART. XIV.[2] SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

See pages 43, 396.

[1] Declared adopted by the secretary of state on the 18th day of February, 1865.
[2] Fourteenth amendment promulgated by the secretary of state 28th of July, 1868.

Insurance—Statutes Regulating Liability on Policies Not Denial of Equal Protection of the Laws.—BEARD, J., held: "The equal protection of the laws is not denied by the Acts of 1893, ch. 107, sec. 1, making void all stipulations in insurance policies limiting liability to less than the full amount of loss, if this does not exceed the amount of insurance." **95**, 248. [1]*Dugger v. Insurance Company.* 1895.

For provisions in old Constitution relating to arrest and return of fugitive slaves, see **33**, 93.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a senator or representative in congress, or elector of president or vice president, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. That congress have power to enforce, by appropriate legislation, the provisions of this article.

ART. XV, SECTION 1. The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or any State, on account of race or color, or previous condition of servitude.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

Declared adopted by the secretary of state March 30, 1870.

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[1] See same case, art. 1, sec. 8 p. 44; art. 1, sec. 20, p. 154.

INDEX TO THE CONSTITUTION OF THE UNITED STATES.

[In this Index the abbreviation am. stands for amendment.]

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each, to give credit to records, etc., of each other State	4	1	1	599
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U. S. to guarantee every, a republican form of government	4	4	1	605
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S

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who may not hold office under	am.	14	3	.. 608
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a, might have been imposed up to 1808 on imported persons	1	9	1	593
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Taxed, Indians not taxed excluded from representative numbers	am.	14	2	.. 608
Taxes, direct, how apportioned among the States	1	2	3	589
congress shall have power to lay and collect	1	8	1	591
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citizenship of representative in congress, seven years	1	2	2	589
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ten years, census to be taken every	1	2	3	589
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T

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U

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Vest, congress may vest power to make certain appointments in president, or, etc	2	2	2	596
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W

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Writings, exclusive right to, may be secured	1	8	8	591

Y

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DECLARATION OF INDEPENDENCE.

[Unanimously Passed by the Congress of the Thirteen United States of America, July 4, 1776.]

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; and that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world:

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them. He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise; the State remaining, in the meantime, exposed to all the dangers of invasion from without and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for the naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of land.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harrass our people and eat out their substance.

He has kept among us, in time of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation.

For quartering large bodies of troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefit of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments;

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries, to complete the works of death, desolation, and tyranny already begun with circumstances of cruelty and perfidy scarcely parallel in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections among us, and has endeavored to bring on the inhabitants of our frontier the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions, we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connection and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind—enemies in war; in peace, friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain, is and ought to be, totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things

which independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire.

Josiah Bartlett,
William Whipple,
Matthew Thornton.

Massachusetts Bay.

Samuel Adams,
John Adams,
Robert Treat Paine,
Elbridge Gerry.

Rhode Island, etc.

Stephen Hopkins,
William Ellery.

Connecticut.

Roger Sherman,
Samuel Huntington,
William Williams,
Oliver Wolcott.

New York.

William Floyd,
Philip Livingston,
Francis Lewis,
Lewis Morris.

New Jersey.

Richard Stockton,
John Witherspoon,
Francis Hopkinson,
John Hart,
Abraham Clark.

Pennsylvania.

Robert Morris,
Benjamin Rush,
Benjamin Franklin,
John Morton,
George Clymer,
James Smith,
George Taylor,
James Wilson,
George Ross.

Delaware.

Cæsar Rodney,
George Read,
Thomas McKean.

Maryland.

Samuel Chase,
William Paca,
Thomas Stone,
Chas Carrol, of Carrolton.

Virginia.

George Wythe,
Richard Henry Lee,
Thomas Jefferson,
Benjamin Harrison,
Thomas Nelson, Jr.,
Francis Lightfoot Lee,
Carter Braxton.

North Carolina.

William Hooper,
Joseph Hewes,
John Penn.

South Carolina.

Edward Rutledge,
Thomas Heyward, Jr.,
Thomas Lynch, Jr.,
Arthur Middleton.

Georgia.

Button Gwinnett,
Lyman Hall,
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